(31)

No. 91-453-CSX
Status: GRANTED

Title: David H. Lucas, Petitioner
v.
South Carolina Coastal Council

Docketed:
September 13, 1991

Court: Supreme Court of South Carolina

Counsel for petitioner: Lewis,A. Camden

Counsel for respondent: Harness III,Connie C.

Entry	Date	Note	Proceedings and Orders
1	Sep 13 1991	G	Petition for writ of certiorari filed.
2	Oct 9 1991		Brief of respondent SC Coastal Council in opposition filed.
3	Oct 10 1991		Brief amicus curiae of Pacific Legal Foundation filed.
4	Oct 16 1991		DISTRIBUTED. November 1, 1991
5	Oct 22 1991	X	Reply brief of petitioner David Lucas filed.
7	Nov 4 1991		REDISTRIBUTED. November 8, 1991
9	Nov 12 1991		REDISTRIBUTED. November 15, 1991
10	Nov 18 1991		Petition GRANTED.
			**********
28	Dec 26 1991		Brief amici curiae of Long Beach Island Oceanfront Homeowners, et al. filed.
29	Dec 30 1991		Brief amicus curiae of Fire Island Association filed.
12	Dec 31 1991		Brief amici curiae of Defenders of Property Rights, et al. filed.
17	Dec 31 1991		Brief of petitioner David Lucas filed.
26	Dec 31 1991		Joint appendix filed.
30	Dec 31 1991		Brief amici curiae of National Association of Home Builders, et al. filed.
11	Jan 2 1992		SET FOR ARGUMENT MONDAY, MARCH 2, 1992. (2ND CASE)
13	Jan 2 1992		Brief amicus curiae of Northern VA Chapter of Natl. Assn.Industrial Parks, et al. filed.
14	Jan 2 1992		Brief amici curiae of U.S. Senator Steve Symms, et al. filed.
15	Jan 2 1992		Brief amicus curiae of Nemours Foundation filed.
16	Jan 2 1992		Brief amici curiae of South Carolina Policy Council Education Foundation, et al. filed.
19	Jan 2 1992		Brief amici curiae of Washington Legal Foundation, et al. filed.
20	Jan 2 1992		Brief amicus curiae of Pacific Legal Foundation filed.
21	Jan 2 1992		Brief amicus curiae of Institute for Justice filed.
22	Jan 2 1992		Brief amicus curiae of National Association of Realtors filed.
23	Jan 2 1992		Brief amici curiae of American Mining Congress, et al. filed.
24	Jan 2 1992		Brief amici curiae of American Farm Bureau Federation, et al. filed.
25	Jan 2 1992		Brief amicus curiae of Chamber of Commerce of the U.S. filed.
27	Jan 2 1992		Brief amicus curiae of United States filed.
31	Jan 2 1992		Brief amici curiae of Mountain States Legal Foundation, et al. filed.
33	Jan 17 1992		Record filed.
		*	Certified record and proceedings Supreme Court of South

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No. 91-453-CSX

Entry	Date	Note	Proceedings and Orders
			Carolina.
32	Jan 28 1992		CIRCULATED.
40	Jan 28 1992	X	Brief amicus curiae of Members of the Natl. Growth Management Leadership Project filed.
35	Jan 30 1992	X	Brief amici curiae of California Cities, et al. filed.
34	Jan 31 1992	X	Brief amicus curiae of Municipal Art Society of New York, Inc. filed.
39	Jan 31 1992	X	Brief amici curiae of Broward County, et al. filed.
44	Jan 31 1992	X	Brief of respondent South Carolina Coastal Council filed.
45	Jan 31 1992	X	Brief amici curiae of Florida, et al. filed.
36	Feb 3 1992	X	Brief amicus curiae of National Trust for Historic Preservation in the U.S. filed.
37	Feb 3 1992	X	Brief amici curiae of U.S. Conference of Mayors, et al. filed.
38	Feb 3 1992	X	Brief amici curiae of Nueces, Texas, et al. filed.
41	Feb 3 1992	X	Brief amici curiae of Sierra Club, et al. filed.
42	Feb 3 1992	X	Brief amicus curiae of California filed.
43	Feb 3 1992	X	Brief amici curiae of American Planning Association, et al. filed.
46	Feb 21 1992	X	Reply brief of petitioner David Lucas filed.
47	Mar 2 1992		ARGUED.

91-453

(1)

No. 91-___

Supreme Court, U.S.
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OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

DAVID H. LUCAS,

Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of South Carolina

PETITION FOR WRIT OF CERTIORARI

A. CAMDEN LEWIS
Counsel of Record
LEWIS, BABCOCK & HAWKINS
1513 Hampton Street
P.O. Box 11208
Columbia, South Carolina 29211
(803) 771-8000

GERALD M. FINKEL
Attorney for Petitioner
FINKEL, GOLDBERG, SHEFTMAN & ALTMAN
P.O. Box 1799
Columbia, South Carolina 29202

DAVID J. BEDERMAN
Of Counsel
Emory University School of Law
Gambrell Hall
Atlanta, Georgia 30322

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Does a land-use regulation, pursuant to a state's police power, require compensation under the Constitution's Fifth Amendment if it totally eliminates the value of private property?

LIST OF PARTIES

The parties to the proceeding below were the Petitioner, David H. Lucas, and the Respondent, the South Carolina Coastal Council. Briefs were filed *amicus curiae* by the NCNB Bank of South Carolina, the Sierra Club and South Carolina Wildlife Federation, and by the Pacific Legal Foundation.

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No. 91-___

In The

Supreme Court of the United States

October Term, 1991

DAVID H. LUCAS,

Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of South Carolina

PETITION FOR WRIT OF CERTIORARI

The Petitioner David H. Lucas respectfully prays that a writ of certiorari issue to review the February 11, 1991, judgment and opinion of the South Carolina Supreme Court, and the June 17, 1991, denial of his Petition for Rehearing in the above-captioned proceeding.

OPINIONS BELOW

The opinion and judgment of the South Carolina Supreme Court dated February 11, 1991, including the dissenting opinion of Justice Harwell (concurred in by Justice Chandler), is reported at 404 S.E.2d 895 (S.C.

1991), and is reprinted in the appendix hereto, at App. 1, infra.

The South Carolina Supreme Court's denial of Petitioner's Petition for Rehearing dated June 17, 1991, has not yet been reported, and is reprinted in the appendix, at App. 32, infra.

The opinion and judgment of the Circuit Court of Charleston County, Special Judge Patterson presiding, of August 10, 1988, was not reported, and is reprinted in the appendix, at App. 33, infra.

STATEMENT OF JURISDICTION

Petitioner seeks review from the opinion and judgment of the South Carolina Supreme Court of February 11, 1991. Petitioner's subsequent Petition for Rehearing was denied on June 17, 1991. The Supreme Court has jurisdiction to review cases from state courts by virtue of 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment of the United States Constitution provides in pertinent part that "private property [shall not] be taken for public use without just compensation."

The South Carolina Beachfront Management Act, 1988 Act No. 634, S.C. Code Ann. § 48-39-10 *et seq.* (1990 Cum. Supp.), as amended by 1990 Act No. 607, is set forth in the appendix, at App. 42, infra.

STATEMENT OF THE CASE

In December 1986, the Petitioner, David H. Lucas, purchased two lots on the Isle of Palms, Charleston County, South Carolina. He paid $975,000 for both pieces of property, which were zoned single-family residential. Lucas intended to build a house on each property, one for his own family and one for resale.

On July 1, 1988, South Carolina's Beachfront Management Act, S.C. Code Ann. § 48-39-10 *et seq.* (1990 Cum. Supp.), came into force. Under the Act, the South Carolina Coastal Council, the Respondent in this Petition, was obliged to draw baselines and setback lines along the South Carolina coast. The Council drew a setback line behind Lucas's properties, thus precluding him from building habitable or permanent structures thereupon.

After the passage of the Act, Lucas filed an action in the Circuit Court of Charleston County, claiming that the Act so restricted his ownership rights that it amounted to a taking of his property without just compensation in violation of both the South Carolina and United States Constitutions. (See Complaint, ¶5; reprinted in Appendix, App. 153, infra.) The Circuit Court, Patterson, J., presiding, found that the Act had worked a permanent and total loss in the value of Lucas's property, and it awarded $1,232,387.50 in compensation. The South Carolina Coastal Council appealed. The South Carolina Supreme Court reversed, holding (on February 11, 1991)

that the Act did not work a taking requiring compensation under either the state or federal constitutions. The South Carolina Supreme Court's decision on the merits of Petitioner's federal constitutional claims appears at *Lucas v. South Carolina Coastal Council*, ___ S.C. ___, 404 S.E.2d 895, 898-902 (1991).

On June 17, 1991, the South Carolina Supreme Court rejected Lucas's Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

THE SOUTH CAROLINA SUPREME COURT FAILED TO PROPERLY WEIGH PRIVATE AND PUBLIC INTERESTS WHEN IT APPROVED A REGULATORY TAKING WITHOUT COMPENSATION

This Petition invites the Court to revisit the nettlesome field of regulatory takings law. The South Carolina Supreme Court has repudiated the recent jurisprudence of this Court by converting an admittedly complex inquiry into a bright-line test which ignores private interests in property affected by state regulation. In holding that the South Carolina Beachfront Management Act (the "Act"), S.C. Code Ann. § 48-39-10 *et seq.* (1990 Cum. Supp.), does not effect a regulatory taking of Petitioner's coastal property, the South Carolina Supreme Court ruled that the state need only prove that it is acting pursuant to its legitimate police powers in order to evade the constitutional duty of just compensation. This ruling is contrary to the recent holdings of this Court and is utterly subversive of takings jurisprudence.

As will be apparent upon reading the South Carolina Supreme Court's decision in this matter, the relevant case law on this subject embraces a recent utterance of this Court on the subject, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), as well as earlier opinions bearing on the question whether states have a duty to provide just compensation when regulations have the effect of all but eliminating the value of private property. This Petition does not concern the exercise of eminent domain. Petitioner concedes that no permanent physical occupation occurred here.[1] Nor does this Petition touch upon the quantum or modalities of "just compensation." Finally, this Petition does not seek to challenge the public wisdom of the South Carolina Act. The South Carolina Supreme Court chose to view Petitioner's position on this last issue as conceding not only the proper exercise of the state's police power for land-use regulation, but also as an admission that Petitioner's intended use of his land amounted to a nuisance. *Lucas v. South Carolina Coastal Council*, ___ S.C. ___, 404 S.E. 2d 895, 898, 900 (1991). But not all exercises of a state's police power are directed

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[1] The recently-filed Petition for Writ of Certiorari in *Beard v. South Carolina Coastal Council*, No. 91-137 (U.S. filed July 26, 1991), chiefly raises a claim of a public easement imposed with the refusal to grant that claimant the right to build a beach bulkhead which could exclude the public. As in the *Ludas* case, however, the South Carolina Supreme Court held the Beards's concession that coastal protection was a legitimate state interest to be an admission that "regulation of property is necessary to protect against serious public harm. . . . thereby prohibiting the finding that the property has been 'taken'." *Beard v. South Carolina Coastal Council*, ___ S.C. ___, ___, 403 S.E.2d 620, 622 (1991).

against nuisances, and the Petitioner maintains that his desire to build private residences on beachfront property is not a nuisance that would legitimize a state regulation having the effect of depriving him of virtually all use in his property, without just compensation.

The proposition that a state's land-use regulation intended to prevent a public nuisance is immune from just compensation originates from this Court's decision in *Mugler v. Kansas*, 123 U.S. 623 (1887). The South Carolina Supreme Court seized upon this exception, enunciated in *Mugler*, to hold that the Act's limitation on the Petitioner's building on his property did not require compensation by the state. *Lucas*. ___ S.C. at ___, 404 S.E.2d at 900. Had the evolution of takings jurisprudence ended in 1887, then the South Carolina Supreme Court's analysis (which utterly ignored the Petitioner's expectation interests in the property) might be justified. *Cf. Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (listing among relevant factors in regulatory takings cases, "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations. . . . "). The truth is, however, that this Court has held that land-use regulation may effect a taking if it does not "substantially advance legitimate state interests" *or* "denies an owner economically viable use of his land." *Agins v. Tiburon*, 447 U.S. 255, 260 (1980); *see also Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987). Once again, Petitioner did not dispute that South Carolina's coastal protection legislation substantially advanced legitimate state interests. The question that Petitioner expected would be resolved by the South Carolina

Supreme Court was whether the regulation so diminished his ownership interests in the coastal property as to constitute a taking requiring compensation under the Fifth Amendment.

Instead, it appears that the South Carolina Supreme Court misconstrued *Keystone Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), to read that a mere finding of a legitimate use of police power makes the regulation directed against a nuisance, and thus immune from compensation, even if the effect of the regulation is to make the property all but worthless. This reading of *Keystone* is flawed for two separate and distinct reasons. First, the South Carolina Supreme Court has assumed that *Keystone* in effect overturned *Agins* and *Nollan* to the extent that they require the public weal in regulation to be weighed against private expectation interests in the property being regulated. The South Carolina Supreme Court's decision on this point jettisons the venerable jurisprudence of Justice Holmes, writing for the majority of the Court in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415.

Keystone's cryptic treatment of this issue has resulted in a split in decisions among the federal Courts of Appeal. The crux of the disagreement is whether all the state must show is a legitimate exercise of police power in order to evade a duty to compensate under the Fifth Amendment. The Court of Appeals for the Fourth Circuit, in a case also concerning the South Carolina Beachfront Management Act, has held that this is simply not enough to satisfy the Constitution. *See Esposito v. South Carolina Coastal Council*, slip op. at 7-10, 1991 U.S. App. Lexis

15106, 1991 Westlaw 117991 (4th Cir. July 3, 1991) (reprinted in appendix, at App. 158, infra). This case concerned two claimants' challenges. The Fourth Circuit Court of Appeals ruled in one case that claimant Esposito had failed to prove that the Act had worked to substantially deny the economically viable use of his land.[2] Implicit in this holding is that *Keystone* still demands that courts balance private and public interests, notwithstanding a finding that the regulation was a valid exercise of police power.

Some federal Courts of Appeal have made this explicit. *See McDougal v. County of Imperial*, slip op. at 12-20, 1991 U.S. App. Lexis 19177, 1991 Westlaw 156897 (9th Cir. Aug. 20, 1991) ("We cannot agree that any legitimate purpose automatically trumps the deprivation of all economically viable use, such that whenever a regulation has a health or safety purpose, no compensation is ever required even if the land owner is thereby denied all use

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[2] *Esposito* is otherwise legally and factually inapposite to Mr. Lucas's case. Mr. Esposito's claim was resolved by the Fourth Circuit by a finding that any diminution in the value of his property, attributable to the Act, was speculative because the Act would only prevent the *re*building of a structure on the land, and not compel any demolition. Mr. Chavous's claim, like Petitioner's, involved the effect of the Act in barring any construction of a structure where none had existed previously. The Fourth Circuit ruled that this claim had been mooted by subsequent changes in the Beachfront Management Act, 1990 Act No. 607, S.C. Code Ann. § 48-39-290(D) (1990 Cum. Supp.). *See Esposito*, slip op. at 6, 10-11. The South Carolina Supreme Court did not consider the effect of any such superseding legislation in Mr. Lucas's case. Of these three claims, only Mr. Lucas's, the Petitioner here, squarely raises the issue of a non-speculative loss of the use of his property.

of his property."); *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1176 (Fed. Cir. 1991) ("Nothing in *Keystone* . . . supports the notion that public purpose alone permits the total destruction of property rights without compensation."); *Yancey v. United States*, 915 F.2d 1534, 1540 (Fed. Cir. 1990) ("We favor the . . . position that the *Keystone* opinion did not hold that the nature of governmental activity conclusively forecloses all claims for just compensation."). To the contrary is a ruling of the Court of Appeals for the Third Circuit in *Empire Kosher Poultry, Inc. v. Hallowell*, 816 F.2d 907, 915 (3d Cir. 1987). This schism in interpreting *Keystone* is likely to grow,[3] despite the fact that the *Keystone* court could not have passed on the question of whether something more than a showing of legitimate police powers is needed to validate a regulatory taking without compensation. After all, *Keystone* involved a facial challenge to a regulation under the Fifth Amendment; no evidence was even proferred concerning economic impact. *See Keystone*, 480 U.S. at 478. *Keystone* does not apply to cases where claimants are seeking more

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[3] State supreme courts have likewise held that, *Keystone* notwithstanding, a regulation directed against a nuisance can still work a taking if it results in a substantial diminution in the value of property. *See Department of Natural Resources v. Indiana Coal Council, Inc.*, 542 N.E.2d 1000, 1003 (Ind. 1989), *cert. denied*, 110 S.Ct. 1130 (1990); *Easter Lake Estates, Inc. v. Polk County*, 444 N.W.2d 72, 75-76 (Iowa 1989) ("Ordinarily, [police powers] may be exercised without payment of compensation. The use of police power may rise to the level of a compensable taking, however, if the control or regulation substantially deprives the owner of the property's use and enjoyment.") (citations omitted).

than injunctive relief, and where a concrete controversy exists concerning the effect of a regulation on a specific parcel of land.

The South Carolina Supreme Court was, nonetheless, express in its ruling on this point: it made no difference *how much* the Petitioner's ownership interest was affected by the regulation. The critical defect of that decision – and the primary reason that review is merited here – is the failure to weigh both private and public interests in the takings calculus, and, instead, relying upon a characterization of the police power implicated in the regulation.

The South Carolina Supreme Court's second misapprehension of *Keystone* goes precisely to that act of characterization and the consequent confusion between legitimate police powers and land-use regulations directed against nuisances. In fairness to the South Carolina Supreme Court, its misstep can be traced to unfortunate language in *Keystone*. In that opinion, a majority of the Court chose not to make the distinction between police powers and nuisances. In declining to grasp the nettle, this Court did *not* question the principle that legitimate land-use regulations under police powers need not be invariably directed against nuisances. Instead, the Court seemed to decide only that the distinction was not important in the case at hand. *Keystone*, 480 U.S. at 490-92. Dissenting opinions in both *Keystone* and *Penn Central Transp. Co.* have attempted to maintain the distinction even in the face of majority opinions which have chosen not to utilize it. *See Keystone*, 480 U.S. at 512-15 (Rehnquist, C.J., dissenting; joined by Powell, O'Connor, Scalia, JJ); *Penn Central Transp. Co.*, 438 U.S. at 145 (Rehnquist, J., dissenting; joined by Burger, C.J. and Stevens, J.) ("The nuisance exception to the taking guarantee is not coterminous with the police power itself").[4]

The necessity of this distinction is graphically illustrated in this case. Once again, Petitioner did not question that the Beachfront Management Act was a valid exercise of South Carolina's police power and was a valid land-use regulation. To have raised such a challenge would have been futile and silly. But the question of legitimate land-use regulation is rather different from the inquiry whether the activity being regulated constitutes a nuisance so as to come within that categorical exception to the taking guarantee.

This second inquiry focuses on the nexus between the individual property owner's intended use of the land and the state interests raised. Although within the domain of takings jurisprudence, this inquiry has many

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[4] Lower federal courts have continued to interpret *Keystone* as requiring a distinction to be drawn between regulations supported by legitimate public policy, and those specifically directed against public nuisances. *See Florida Rock Industries, Inc. v. United States*, 21 Cl. Ct. 161, 166-68 (1990).

A number of state supreme courts have likewise held. *See Western Energy Co. v. Genie Land Co.*, ___ Mont. ___, ___, 737 P.2d 478, 482 (1987) ("The [U.S. Supreme] Court has never allowed the nuisance exception to allow complete extinction of a parcel of property.") (paraphrasing *Keystone*, 480 U.S. at 470, (Rehnquist, C.J., dissenting)); *Orion Corp. v. State*, 109 Wash.2d 621, 650-51, 747 P.2d 1062, 1078 (1987) ("We [have] held that [a] challenged regulation could not effect an eminent domain taking, unless the nature of the encumberance imposed by the regulation went beyond preventing harm to actually enhance a publicly owned right in land."), *cert. denied*, 486 U.S. 1022 (1988).

qualities of substantive due process analysis. *See Hadacheck v. Sebastian*, 239 U.S. 394, 407 (1915); *Lawton v. Steele*, 152 U.S. 133, 136-37 (1894). However this analysis is denominated – and whatever its standard – it is manifest that the South Carolina Supreme Court chose not to make this inquiry, and, instead, rested squarely on the Petitioner's reasoned and intelligent concession that the Act was merely a legitimate exercise of State regulation.

It is obviously not the place of this Court to substitute its judgment for that of the South Carolina Supreme Court for the two determinations it was required to make under the Fifth Amendment to the Constitution: (1) was the effect of the Act to regulate, in the Petitioner's case, an activity constituting a nuisance?, and (2), even so, was the Petitioner's ownership interest in property so substantially diminished as to result in a regulatory taking requiring compensation? The significant fact is that the South Carolina Supreme Court failed to decide these issues, and, instead, relied on a categorical rule of construction that is erroneous in law and utterly subversive of the Fifth Amendment guarantee against public takings without just compensation.

If this Petition is granted, this Court can pass upon the continued vitality of the nuisance exception to the takings guarantee. The Court may choose to abandon the exception altogether. Or it may prefer to limit its scope to occasions where the land-use regulation is specifically directed against a public nuisance, and is not just an exercise of a State's legitimate police power. Finally, the Court may wish to affirm some form of the nuisance exception, but with the proviso that in cases where the value of the property affected is so substantially reduced

as to frustrate pre-existing investment-backed expectations, then compensation is still due under the Fifth Amendment. Although Petitioner intends to vigorously argue each of these positions to the Court, he is, of course, indifferent as to which might be selected. The result would still be the same: a remand of the case to the South Carolina Supreme Court for a more searching – and constitutionally defensible – determination of Petitioner's rights and interests in his property.

CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari should be granted, and the Court should allow Petitioner to file his brief and to articulate more comprehensively why the South Carolina Supreme Court failed to properly weigh private and public interests when it approved this regulatory taking without compensation. If the South Carolina Supreme Court's decision goes unreviewed it will mean that a mere showing of legitimate exercises of police power in land-use regulation, without any concomitant balancing of private interests, will suffice in denying just compensation for takings under the Fifth Amendment to the United States Constitution.

Respectfully submitted,

A. Camden Lewis*
Lewis, Babcock & Hawkins
1513 Hampton Street
P.O. Box 11208
Columbia, South Carolina
29211
(803) 771-8000

Of Counsel:

David J. Bederman
Emory University School
of Law
Gambrell Hall
Atlanta, Georgia 30322

Gerald M. Finkel
Finkel, Goldberg,
Sheftman & Altman
P.O. Box 1799
Columbia, South Carolina
29202

Attorneys for Petitioner

*Counsel of Record

September 13, 1991

APPENDIX A

David H. LUCAS, Respondent.

v.

SOUTH CAROLINA COASTAL COUNCIL, Appellant,

No. 23342.

Supreme Court of South Carolina.

Heard April 2, 1990.

Decided Feb. 11, 1991.

C.C. Harness, III, of S.C. Coastal Council, Charleston, for appellant.

Gedney M. Howe, III; and Ellison D. Smith, IV, of Smith & Bundy, Charleston, for respondent. Samuel H. Altman, of Altman & Sturgis, P.A., Charleston, amicus curiae, for NCNB Bank of South Carolina, James S. Chandler, Jr., Pawleys Island, amicus curiae, for Sierra Club and S.C. Wildlife Federation, Steven M. Rudisill, Rock Hill; and Ronald A. Zumbruy, Edward J. Connor, Jr., and Timothy V. Kassouni, of Pacific Legal Foundation, Sacramento, Cal., amicus curiae, for Pacific Legal Foundation.

TOAL, Justice:

This appeal concerns whether the enforcement and application of the 1988 Beachfront Management Act to the plaintiff-respondent's property is a taking of such property without just compensation.

FACTS

David H. Lucas, the respondent, owns two vacant oceanfront lots in the Beachwood East Subdivision of the Wild Dunes development on the Isle of Palms in Charleston County, South Carolina. The Beachfront Management Act, S.C.Code Ann. § 48-39-10 *et seq.* (1989 Cum.Supp.) (hereinafter referred to as "Act") limits construction within the beach/dune system in a critical area, as defined by the Act. As applied to the two Lucas lots, the Act prohibits, through statutorily mandated setback lines, the construction of any permanent structure (including a dwelling), save a small deck or walkway.

Lucas instituted an action in the Court of Common Pleas, asserting that the restrictions on the use of his lots worked a taking of his property without just compensation. The lower court agreed and awarded Lucas $1,232,387.50 as just compensation for the "regulatory" taking. The South Carolina Coastal Council, the administrator of the Beachfront Management Act, now appeals. We reverse.

LAW/ANALYSIS

Although the regulatory takings questions is a complex one, and although regulations affecting coastal property are especially problematic,[1] this appeal presents, in

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[1] For example, theories such as dedication, prescription, custom, purpresture, and the public trust doctrine can be resorted to by the public in an attempt to regulate private property immediately adjacent to the public property which

(Continued on following page)

the end, what in our view is a relatively straightforward issue. The issue is whether governmental regulation of the use of property, in order to prevent serious public harm, amounts to a "regulatory taking" of property for which compensation must be paid. Lucas' position, which is dealt with more extensively below, is that if he is deprived of "all economically viable use" of his property, he must be compensated for it even if the regulation depriving him of such is a use-restriction regulation enacted to prevent serious public harm. Coastal Council's view, obviously, is that no compensation is due a landowner whose private use threatens serious public harm. We choose to characterize this issue as "straightforward" because, in the final analysis, Lucas' position and the position of our dissenting brothers, is the position of the dissent in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987), while the Council, 281 S.C. 201, 314 S.E.2d 327 (1984). We choose not to overrule *Carter*, and we choose to follow the majority view rather than the dissent in *Keystone*.

(Continued from previous page)

sits below the mean highwater mark. *See generally* Finnell, *Public Access to Coastal Public Property: Judicial Theories and the Taking Issue*, 67 N.C.L. Rev. 627 (1989). We express no opinion concerning the force and validity of those theories in particular circumstances. We also express no opinion on the validity of portions of the Act to certain lands in light of our rule that, when a landowner causes his land to accrete through artificial means, he does not become the owner under the doctrine of title by accretion. *See Epps v. Freeman*, 261 S.C. 375, 200 S.E.2d 235 (1973).

Lucas concedes that the Beachfront Management Act is properly and validly designed to preserve the extremely valuable resource which is South Carolina's beaches. He concedes that the preservation of this existing public resource from harm is a "laudable goal." *See* Respondent's Brief, at p. 4. He admittedly fails to attack the validity of the Act, and therefore concedes the validity of the legislative declaration of its "findings" and "policy" embodied in Sections 1 and 2 of 1988 Act No. 634.[2] This Court is therefore in no position to question the legislative scheme or purpose. Section 1 of the Act reads:

SECTION 1. The General Assembly finds that:

(1) *The beach/dune system along the coast of South Carolina is extremely important to the people of this State* and serves the following functions:

(a) *protects life and property by serving as a storm barrier* which dissipates wave energy and contributes to shoreline stability in an economical and effective manner;

(b) *provides the basis for a tourism industry* that generates approximately two-thirds of South Carolina's annual tourism industry revenue which constitutes a significant portion of

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[2] It appears that Sections 1 and 2 of the 1988 Act were intended to be labeled as amendments to S.C.Code Ann. §§ 48-39-20 (1987) (entitled "Legislative declaration of findings") and 48-39-30 (1987) (entitled "Legislative declaration of state policy"), although they are not designated as such in the actual codification. *See* Editor's Note to § 48-39-270. The sections have, during the pendency of this case, been incorporated into the codification as Sections 48-39-250 and 48-39-260. Concomitantly, sections 1 and 2 of the 1988 Act have, as such, been repealed. *See* Act 607, 1990 S.C. Acts 2581.

the state's economy. The tourists who come to the South Carolina coast to enjoy the ocean and dry sand beach contribute significantly to state and local tax revenues;

(c) *provides habitat for numerous species of plants and animals, several of which are threatened or endangered*. Waters adjacent to the beach/dune system also provide habitat for many other marine species;

(d) *provides a natural health environment for the citizens of South Carolina* to spend leisure time which serves their physical and mental well-being.

(2) Beach/dune system vegetation is unique and extremely important to the vitality and preservation of the system.

(3) *Many miles of South Carolina's beaches have been identified as critically eroding.*

(4) Chapter 39, Title 48, Code of Laws of South Carolina, 1976, Coastal Tidelands and Wetlands, does not provide adequate jurisdiction to the South Carolina Coastal Council to enable it to effectively protect the integrity of the beach/dune system. Consequently, without adequate controls, development has been unwisely sited too close to the system. This type of development has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property. It is in both the public and private interests to protect the system from this unwise development.

(5) The use of armoring in the form of hard erosion control devices such as seawalls, bulkheads, and rip-rap to protect erosion-threatened structures adjacent to the beach has not

proven effective. These armoring devices have given a false sense of security to beach front property owners. In reality, these hard structures, in many instances, have increased the vulnerability of beach front property to damage from wind and waves while contributing to the deterioration and loss of the dry sand beach which is so important to the tourism industry.

(6) *Erosion is a natural process which becomes a significant problem for man only when structures are erected in close proximity to the beach/dune system. It is in both the public and private interests to afford the beach/dune system space to accrete and erode in its natural cycle. This space can be provided only by discouraging new construction in close proximity to the beach/dune system and encouraging those who have erected structures too close to the system to retreat from it.*

(7) Inlet and harbor management practices, including the construction of jetties which have not been designed to accommodate the long shore transport of sand, can deprive downdrift beach/dune systems of their natural sand supply. Dredging practices which include disposal of beach quality sand at sea also can deprive the beach/dune system of much-needed sand.

(8) It is in the state's best interest to protect and to promote increased public access to South Carolina's beaches for out-of-state tourists and South Carolina residents alike.

(9) Present funding for the protection, management, and enhancement of the beach/dune system is inadequate.

(10) There is no coordinated state policy for post-storm emergency management of the beach/dune system.

(11) A long-range comprehensive beach management plan is needed for the entire coast of South Carolina to protect and effectively manage the beach/dune system, thus preventing unwise development and minimizing man's adverse impact on the system.

(Emphasis added).

Section 2 of the Act reads:

SECTION 2. In recognition of its stewardship responsibilities, the policy of South Carolina is to:

(1) protect, preserve, restore, and enhance the beach/dune system, the highest and best uses of which are declared to provide:

(a) a barrier and buffer from high tides, storm surge, hurricanes, and normal erosion;

(b) a public area which serves as a major source of state and local revenue;

(c) habitat for indigenous flora and fauna;

(d) a place which harbors natural beauty;

(2) create a comprehensive, long-range beach management plan and require local comprehensive beach management plans for the protection, preservation, restoration, and enhancement of the beach/dune system. These plans must promote wise use of the state's beach front to include a gradual retreat from the system over a forty-year period;

(3) severely restrict the use of hard erosion control devices to armor the beach/dune system and to encourage the replacement of hard erosion control devices with soft technologies as approved by the Coastal Council which will provide for the protection of the shoreline without long-term adverse effects;

(4) encourage the use of erosion-inhibiting techniques which do not adversely impact the long-term well-being of the beach/dune system;

(5) promote carefully planned nourishment as a means of beach preservation and restoration where economically feasible;

(6) preserve existing public access and promote the enhancement of public access to assure full enjoyment of the beach by all our citizens including the handicapped;

(7) involve local governments in long-range comprehensive planning and management of the beach/dune system in which they have a vested interest;

(8) establish procedures and guidelines for the emergency management of the beach/dune system following a significant storm event.

By failing to contest these legislative findings, Lucas concedes that the beach/dune area of South Carolina's shores is an extremely valuable public resource; that the erection of new construction, *inter alia*, contributes to the erosion and destruction of this public resource; and that discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm. This Court is likewise bound by these uncontested legislative findings. In lieu of any attack whatsoever on

the statutory scheme, Lucas rests on a solitary argument, *viz.*, that he is still, despite these concessions, entitled to compensation from the State. He contends that a single legal test exists which, if failed, conclusively establishes that a "regulatory taking" has occurred. Lucas maintains that if a regulation operates to deprive a landowner of "all economically viable use" of his property, it has worked a "taking" for which compensation is due, regardless of any other consideration. This is simply an erroneous statement of existing law.

At the outset, we recently noted that "[t]he United States Supreme Court has never articulated a 'set formula' to determine where regulation ends and taking begins." *Moore v. Sumter County Council*, 300 S.C. 270, 387 S.E.2d 455, 457 n. 2 (1990). As a result, "takings" cases have been decided by the Supreme Court on a case-by-case basis, with the Court considering a variety of factors depending upon the circumstances before them. Among the factors considered are: (1) the economic impact of the regulation; (2) the regulation's interference with investment backed expectations; (3) the character of the government action (whether there is a physical invasion); and (4) the nature of the State's interest in the regulation. *See Keystone, supra*, 107 S.Ct. at 1244, 1247.

One or more but fewer than all of these factors may be critical and determinative in a given case. A clear example of this is the fact that the United States Supreme Court has almost invariably found a taking when the government regulation is characterized as a permanent physical occupation. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-438, 102 S.Ct. 3164, 3175-3177, 73 L.Ed.2d 868 (1982).

A second clear example is in the fact that a taking has not been found when the regulation exists to prevent serious public harm. *See, e.g., Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887) (prohibition on the manufacture and sale of intoxicating liquors); *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915) (ordinance prohibiting the manufacture of bricks near residents in Los Angeles); *Miller v. Schoene*, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928) (state action destroying diseased cedar trees of certain property owners to prevent the infection of apple orchards); and *Goldblatt v. Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962) (prohibition against excavating below the water table in order to extract gravel).

The Supreme Court has noted that the "special status" of this kind of regulation can be understood by way of "the simple theory that since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity." *Keystone, supra*, 107 S.Ct. at 1245 n. 20. In conjunction with this analysis, the Supreme Court has stated it "is hard to imagine a different rule that would be consistent with the maxim *'Sic utere tuo ut alienum non laedas'* [use your own property in such manner as not to injure that of another]." (Brackets in the original). *Id.*, 107 S.Ct. at 1246 n. 22.

This Court has repeatedly used this same analysis in determining regulatory takings questions. Finding that the regulation under attack prevented a use seriously harming the public, we have concluded that no regulatory taking has occurred. *See, e.g., Carter v. South Carolina*

Coastal Council, 281 S.C. 201, 314 S.E.2d 327 (1984) (regulating the use and alteration of wetlands); *Arnold v. City of Spartanburg*, 201 S.C. 523, 23 S.E.2d 735 (1943) (regulating the sale of intoxicating liquors); and *Richards v. City of Columbia*, 227 S.C. 538, 88 S.E.2d 683 (1955) (mandating the repair, alteration, or closing of dwellings unfit for habitation in order to protect public health and welfare).

In some of our opinions, we have indicated that no compensation is ever due a landowner when the State acts pursuant to its police power. *See, e.g., Brabham v. City of Sumter*, 275 S.C. 597, 274 S.E.2d 297 (1981) and *Edens v. City of Columbia*, 228 S.C. 563, 91 S.E.2d 280 (1956). This is perhaps too mechanical. In at least one case, the United States Supreme Court found a regulatory taking despite the fact that the State was acting pursuant to its police powers. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). In *Loretto*, a New York law required landlords to permit cable television companies to install cable facilities on their rental property. The law was validly within the New York police powers as authorizing "rapid development of and maximum penetration by a means of communication which has important educational and community aspects." *Id.*, 102 S.Ct. at 3170. Despite this regulation for the public good, the Supreme Court found a taking since there was a physical occupation of the landowner's property.

Hence, merely because the State acts within its police powers does not end the inquiry. Nevertheless, the fact remains that the Supreme Court has time and again held that when a State merely regulates use, and acts to prevent a serious public *harm*, there is no "taking" for which

compensation is due. *See Mugler, Hadacheck, Miller,* and *Goldblatt, supra*. It is therefore the *way* the police power is exercised that is of critical import. Were we to adopt Lucas' argument, whether the State acts pursuant to its police power would be *wholly* irrelevant.

As mentioned earlier, Lucas fails to attack in any way the legislature's "findings" that new construction would cause serious public harm. This amounts to a concession that the *Mugler* "nuisance-like exception" applies. This Court is in no position to *sua sponte*, take issue with these legislative findings. Instead, we are constrained to base our ruling only upon Lucas' contention that a taking of property occurs when he is deprived, by operation of the regulation, of "all economically viable use" of his property. Lucas advances this proposition because of the United States Supreme Court's use of the "all economically viable use" test in certain regulatory taking cases. *See Keystone*, 107 S.Ct. at 1247 (*citing Agins v. Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980)).[3] It is clear, however, that such is not the dispositive test in *all* cases. Lucas' position is clearly erroneous in light of the fact that the *Keystone* majority squarely rejected the identical contention in 1987.

In the *Keystone* case, the United States Supreme Court dealt with a takings challenge by coal companies to the

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[3] If Lucas can demonstrate a deprival of all economically viable use of his land, there is no need to weigh factors such as the economic impact of the regulation and/or the regulation's interference with investment backed expectations. Such a showing by Lucas would by necessity weigh these factors in his favor.

Pennsylvania Subsidence Act, which required that fifty percent of the coal beneath certain structures be kept in place to provide surface support. In relating the history of the present takings analysis, the Court first cited *Mugler v. Kansas*, 123 U.S. 623, 668, 8 S.Ct. 273, 300, 31 L.Ed.2d 205 (1887) and its progeny for the proposition that, "prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking . . . " *Keystone, supra*, 107 S.Ct. at 1244.

Twenty-five years after *Mugler*, the Supreme Court decided the case of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922). There, Justice Holmes wrote,

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts.

Id. at 413, 43 S.Ct. at 159. *Pennsylvania Coal* is relied upon by Lucas for his asserted proposition that in *all* cases, when *all* economically viable use is extinguished by regulation, compensation is due. This exact contention was

presented to the *Keystone* Court, which rejected such a rule.

The *Keystone* Court explained:

> We reject petitioner's implicit assertion that *Pennsylvania Coal* overruled [*Mugler* and its progeny] *which focused so heavily on the nature of the state's interest* in the regulation. Just five years after the *Pennsylvania Coal* decision, Justice Holmes joined the Court's unanimous decision in *Miller v. Schoene*, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928), holding that the takings clause did not require the State of Virginia to compensate the owner of cedar trees for the value of the trees that the State had ordered destroyed. The trees needed to be destroyed to prevent a disease from spreading to nearby apple orchards, which represented a far more valuable resource. . . . [I]t was clear that the State's exercise of its police power to prevent the impending danger was justified, and did not require compensation.

(Emphasis added) 480 U.S. at 490, 491, 107 S.Ct. at 1244, 1245. In *Keystone*, the Supreme Court again approved the *Mugler* rule that, in some cases, no compensation is due regardless of the remaining worth of the property after regulation. Specifically, the *Keystone* Court noted that "[l]ong ago it was recognized that 'all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.' " 480 U.S. at 491-92, 107 S.Ct. at 1245 (*quoting Mugler v. Kansas*, 123 U.S. at 665, 8 S.Ct. at 299).[4]

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[4] We note only to prevent possible confusion that the *Keystone* majority proceeded, after reaffirming the *Mugler* rule,

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Once again, we note that Lucas does not challenge the fact that the legislation here is necessary to prevent serious injury to the community, nor does he contend that the setback requirements affecting him are unreasonable or disproportionate to the goal of preventing the specified harms. In fact, Lucas does not even seek an injunction to prevent enforcement of the Act. Instead, Lucas merely prays for damages and asserts that he is entitle to such, regardless of how the proposed use of his property harms the public, because all economically viable use of his land has been extinguished. Lucas' argument tracks the position of Justice Rehnquist's dissent in *Keystone*.[5] We follow the *Keystone* majority and also reject this contention.

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to analyze the taking issue before them by looking at whether the Pennsylvania Subsidence Act deprived the owner of all economically viable use of their lands. However, it is clear that the Court did not engage in this latter analysis for reasons of necessity, but instead did so because the plaintiff also failed to show adequate deprival of viable economic use. The Court stated, after declaring the validity of the *Mugler* rule, "[n]onetheless, we *need not* rest our decision on this factor alone (meaning the *Mugler* rule), because petitioners have *also* failed to make a showing of [sufficient] diminution of value. . . . " *Id.*, 480 U.S. at 492-93, 107 S.Ct. at 1246.

[5] The *Keystone* dissent labels the *Mugler* line of cases the "nuisance *exception*", but then states that in no case has the Court "accepted the proposition that the State may completely extinguish a property interest or prohibit all use without providing compensation." 480 U.S. at 513, 107 S.Ct. at 1257 (Rehnquist J. dissenting). Lucas' argument is clearly simply a rephrasing of this same position.

Our decision in *Carter v. South Carolina Coastal Council*, 281 S.C. 201, 314 S.E.2d 327 (1984) is perhaps the best South Carolina representative of the *Keystone* majority analysis in action. In *Carter* we held that "the state may properly regulate the use of property where uncontrolled use would be harmful to the public interest; and this regulation, even though it prohibits a beneficial use, will not necessarily be deemed a taking in the constitutional sense." *Id.*, 281 S.C. at 204, 314 S.E.2d at 329. There, we upheld the validity of the 1977 Coast Zone Management Act, which prevented the uncontrolled use of coastal wetlands, since such use had a detrimental effect upon "the public welfare." *Id.* Our analysis in *Carter* did not contain a discussion of whether any "economically viable use" remained in the property of the landowners after regulation. It is clear, however, that the plaintiffs in *Carter* were as much deprived of all economically viable use of their lands as Lucas is. To adopt Lucas' argument would therefore be to overrule *Carter*. We choose not to do so.

Carter is an example of an appropriate application of the *Mugler* rule regarding regulation designed to prevent a serious public harm.[6] The application of the *Mugler* rule to appropriate regulatory takings questions has been validated in the recent *Keystone* decision.[7] The *Mugler* rule

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[6] The *Carter* decision relies in part on *Goldblatt v. Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962), which is one of *Mugler's* progeny.

[7] During the pendency of this case, two other courts have interpreted *Keystone* in exactly the way we have. In *McNulty v. Town of Indialantic*, 727 F.Supp. 604 (M.D.Fla.1989), a Florida District Court rejected a landowner's contention that a town

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may therefore be applied again under the appropriate set of facts. Lucas' *de facto* concession of the validity of the legislative scheme and of its purposes makes the instant set of facts appropriate for the application of the *Mugler* rule. We need not address the remaining issues in this case, and we express no opinion regarding them.[8] Accordingly, we REVERSE the decision of the lower court.

GREGORY, C.J., and FINNEY, J., concur.

HARWELL and CHANDLER, JJ., dissent in separate opinion.

HARWELL, Justice, dissenting:

I respectfully dissent. For the reasons discussed below, I would affirm the circuit court order which determines that application of the Beachfront Management Act

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ordinance imposing setback requirements on oceanfront property worked a "taking". The *McNulty* Court held, in pertinent part, "the government can destroy [by regulation] all economic use if necessary to avoid a public nuisance or nuisance like use." 727 F.Supp. at 609. In *Presbytery v. King County*, 114 Wash.2d 320, 787 P.2d 907 (1990) *cert. denied* ___ U.S. ___, 111 S.Ct. 284, 112 L.Ed.2d 238 (1990) a county ordinance prohibited all construction on several wetlands lots of the plaintiff-landowner. The *Presbytery* Court observed that if a regulation protects the public from harm, and does not infringe upon the right of the landowner to possess, exclude others, and dispose of the property, no "taking" has occurred.

[8] We also do not address the issue, not raised in this case, of whether Lucas may build a habitable structure or other structures under the provisions and procedures of the 1990 amendments to the Beachfront Management Act. *See* Act 607, 1990 S.C. Acts 2581.

under these facts does constitute a taking, and hold that the Coastal Council must either compensate Lucas in the amount set forth in the order of the circuit court or issue a permit for the construction of habitable structures on his property pursuant to the 1990 amendments to the Beachfront Management Act.[1]

DISCUSSION

The Fifth Amendment of the United States Constitution provides that "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V. The South Carolina Constitution provides that "private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made therefor." S.C. Const. Art I § 13. Takings cases are generally recognized as falling into one of two categories: those pursuant to an exercise of eminent domain and those pursuant to an exercise of the police power. Eminent domain involves the taking of property for public use for which compensation is required to be made; police power involves regulation of private property to prevent its use in a manner detrimental to the public interest and will not necessarily result in a taking in the constitutional sense. *Carter v.*

[1] Although certain amendments to the Beachfront Management Act had not been enacted at the time this case was adjudicated, I note that neither the majority opinion nor the dissent prohibit Lucas from pursuing a course of action under the 1990 amendments which would enable him to construct a new habitable structure within the guidelines set forth in the amendments. *See*, S.C.Code Ann. §§ 48-39-290(A)(6) and 48-39-290(D)(1) (Supp. 1990).

South Carolina Coastal Council, 281 S.C. 201, 204, 314 S.E.2d 327, 329 (1984). A governmental taking of property may, however, be accomplished without the formal apparatus of eminent domain; a taking may result from a government regulation in a particular area. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 316, 107 S.Ct. 2378, 2386, 96 L.Ed.2d 250, 265 (1987).

The question of when regulation pursuant to a police power becomes a taking is not easily answered. Despite the wealth of authority on the subject of regulatory takings, this is an area of considerable confusion. Indeed, as Justice Stevens recognized in his dissent in *First English Evangelical*, the regulatory takings decisions of the United States Supreme Court have been "open-ended and standardless." 482 U.S. at 340, 107 S.Ct. at 2378, 90 L.Ed.2d at 280 (footnote 17). As one commentator noted, the "[r]egulatory taking doctrine is the most perplexing area of American land use law."[2] This case necessitates explication of the pertinent decisions in this area and reflects my interpretations of regulatory takings law.

The starting point for this discussion with the 1887 case of *Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed.

[2] Settle, *Regulatory Taking Doctrine in Washington, Now You See It, Now You Don't*, 12 U.Puget Sound L.Rev. 339 (1989). The lack of uniformity in this area has been noted by other commentators. *See, e.g.* C. Harr, Land Use Planning (3d ed. 1977); Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U.L.Rev. 165 (1974); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv.L.Rev. 1165 (1967); Rose, *Mahon Reconstructed: Why the Takings Clause is Still a Muddle*, 57 S.Cal.L.Rev. 56 (1984).

205 (1887) in which the Supreme Court recognized that "government can prevent a property owner from using his property to injure others without having to compensate the owner for the value of the forbidden use." *Penn Central Transportation Company v. New York*, 438 U.S. 104, 144, 98 S.Ct. 2646, 2669, 57 L.Ed.2d 631, 661 (1978). At issue in *Mugler* was a statute prohibiting use of a distillery for the manufacture of intoxicating liquors. The Supreme Court upheld the statute and reasoned that the power of the State to prohibit uses of property "prejudicial to the health, the morals, or the safety of the public, is not . . . burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain." *Mugler v. Kansas*, 123 U.S. at 669, 8 S.Ct. at 301, 31 L.Ed. at 213.

Mugler stands for the proposition that where the legislature has deemed an act to be necessary for the public's health, safety, and welfare, the judiciary need not scrutinize the acts of the legislature regardless of the extent of loss suffered by the property owner. A prohibition on the use of property, enacted in the interest of the community as a whole, the *Mugler* court held, cannot be deemed a taking or appropriation.

For the same reasons as those articulated in *Mugler*, the Supreme Court has held other state action not to constitute a compensable taking when necessary to prevent property owners from using such property in a manner which I perceive to be best described as nuisance oriented. *See, e.g. Hadacheck v. Sebastian*, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915) (statute disallowing operation of a brickyard in a residential area); *Reinman v. City of Little Rock*, 237 U.S. 171, 35 S.Ct. 511, 59 L.Ed. 900 (1915)

(law disallowing operation of livery stable in downtown area); *Miller v. Schoene*, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928) (statute ordering destruction of red cedar trees because they produced cedar rust fatal to apple trees, an important state crop).

The viability of the *Mugler* analysis was first questioned in *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922). Instead of following the *Mugler* approach of deferring to the judgment of the legislature with respect to the regulation at issue in *Pennsylvania Coal*, the Supreme Court instead evaluated the subject regulation and determined that the public interest it protected was not sufficient to warrant an exercise of police power. Justice Holmes, writing for the majority, noted that "[a] . . . strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal v. Mahon*, 260 U.S. at 416, 43 S.Ct. at 160, 67 L.Ed. at 326. Rather, the general rule as enunciated in *Pennsylvania Coal* is that "[w]hile property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S. at 415, 43 S.Ct. at 160, 67 L.Ed. at 326.

The test which emerged from *Pennsylvania Coal* is that a reviewing court should first determine whether a regulation sufficiently implicates the public interest such that a state can enact it as a legitimate police power measure; and second, determine the extent of diminution in value suffered by the property owner. If the regulation goes too far, it is a taking for which an owner must be compensated. The test has recently been more succinctly stated to be that land use regulation can effect a taking if

it "does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land." *Agins v. Tiburon*, 447 U.S. 225, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106, 112 (1980).

After *Pennsylvania Coal*, the *Mugler* rule was no longer viewed as dispositive. In fact, the *Mugler* approach was essentially the same as that of the minority opinion in the *Pennsylvania Coal* case: that as long as a regulation serves an appropriate means to public end, restriction upon use does not constitute a taking merely because it deprives the owner of the property's only profitable use. *Pennsylvania Coal v. Mahon*, 260 U.S. at 417, 43 S.Ct. at 160, 67 L.Ed. at 326. (Brandeis, J. dissenting). Therefore, after *Pennsylvania Coal*, the *Mugler* case was thought by many to have fallen by the wayside. This perception was dispelled however, five years later with the Supreme Court's decision in *Miller v. Schoene, supra*. In *Miller*, the Supreme Court, applying *Mugler*, upheld a statute which required the owners of red cedar trees to destroy the trees because they produced cedar rust, a disease fatal to the state's apple crop. Thus, after *Miller*, some confusion existed as to whether to apply the *Mugler* rule or that of *Pennsylvania Coal*. In two subsequent cases, *Goldblatt v. Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962) and *Penn Central Transportation Company v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), the Supreme Court applied, respectively, the *Mugler* rule and the *Pennsylvania Coal* test.

In *Goldblatt v. Hempstead, supra*, the Supreme Court upheld, pursuant to a *Mugler* nuisance analysis, a statute forbidding excavation of sand below the water line. The

Goldblatt Court nonetheless recognized that certain regulation may be "so onerous as to constitute a taking which constitutionally requires compensation." 369 U.S. at 594, 82 S.Ct. at 990, 8 L.Ed.2d at 133.

In *Penn Central Transportation Company v. New York City, supra*, the Supreme Court upheld a landmark preservation law which prohibited Penn Central Railroad from erecting an office tower on top of the Grand Central Railroad Terminal. In *Penn Central* the Court candidly admitted that it had previously been unable to develop any "set formula" for determining when "justice and fairness" require the government to compensate landowners. 438 U.S. at 124, 98 S.Ct. at 2659, 57 L.Ed.2d at 648. In upholding the preservation law, the Court applied the *Pennsylvania Coal* test and determined that because the regulation served a strong public interest, did not completely destroy the economic value of the property, and did not substantially interfere with reasonable investment backed expectations it did not constitute a taking. The test first enunciated in *Pennsylvania Coal*, therefore continued in *Penn Central* to be that regulation can effect a taking if it "does not substantially advance legitimate state interests . . . or denies an owner economically viable use of its land." Because the preservation law advanced a legitimate state interest and the owner retained economically viable use of the terminal, a taking was determined not to have occurred.

The next significant decision of the Supreme Court to address the test to be applied in regulatory takings cases is *Keystone Bituminous Coal Association v. Debenedictis*, 480 U.S. 470, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987). In *Keystone*, the plaintiffs challenged the constitutionality of a

Pennsylvania statute known as the Bituminous Mine Subsidence and Land Conservation Act. The Subsidence Act required coal companies to keep in the ground at least 50% of the coal beneath defined structures to protect these structures from subsidence damage. Although the Supreme Court held that a taking had not occurred the method by which it arrived at this holding has been the subject of considerable debate. Part of the reason for this debate is the persistent confusion over when *Mugler* is applicable. Although it continues to recognize the vitality of the *Mugler* line of cases, the *Keystone* Court nonetheless continues to retain the two prong test first recognized in *Pennsylvania Coal*. The *Keystone* Court unequivocally recognizes that it retains this as the test by stating:

> "The two factors that the Court considered relevant [in *Pennsylvania Coal*], have become integral parts of our takings analysis. We have held that land use regulation can effect a taking if it 'does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land.' *Agins v. Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106, 112 (1980) (citations omitted); *see also Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631, 648 (1978)."

and continues by holding that: "[a]pplication of these tests to petitioners' challenge demonstrates that they have not satisfied their burden of showing that the [Act] constitutes a taking." 480 U.S. at 485, 107 S.Ct. at 1242, 94 L.Ed.2d at 488. Clearly, then, despite the myriad of considerations which go into an analysis of the factors

included in the above mentioned test, it still emerges as the test after *Keystone*.

The first prong of this traditional test is discussed under the heading of "The Public Purpose." *Keystone Bituminous Coal Association v. Debenedictis*, 480 U.S. at 485, 107 S.Ct. at 1242, 94 L.Ed.2d at 488. It is at this point that the Court explicitly holds that its *Mugler* line of cases were not overruled by *Pennsylvania Coal*, 480 U.S. at 490, 107 S.Ct. at 1244, 94 L.Ed.2d at 491. The Court then goes on to affirm that a state's interest in "preventing activities similar to public nuisances is a substantial one, which in many instances has not required compensation." 480 U.S. at 492, 107 S.Ct. at 1246, 94 L.Ed.2d at 493. The Court further holds that the act at issue in *Keystone* "plainly seeks to further such an interest." *Id.* In so holding the *Keystone* Court equates subsidence mining to the nuisances sought to be abated in the *Mugler* line of cases. Accordingly, the *Keystone* opinion reaffirms the teaching of *Mugler* that certain uses are so noxious that an owner is not entitled to compensation, and that "the nature of the state action plays [an important role] in our takings analysis." 480 U.S. at 490, 107 S.Ct. at 1245, 94 L.Ed.2d at 491. Although the *Keystone* opinion marks a continued recognition of the *Mugler* rule, it does not abolish the *Pennsylvania Coal* factors. Further, the *Keystone* Court does not hold that every exercise of police power can escape the Constitution by calling that which it seeks to prevent a nuisance. Such an interpretation would totally eviscerate the takings clause. Indeed, if we were to accept an interpretation of *Keystone*, based on *Mugler*, that any exercise of police power could not effect a taking, we would have to say that there would never be any need to reach

the second part of the test: diminution in value. No matter how valueless a person's property, if the taking was pursuant to a valid exercise of the police power it could *never* be compensated. As feared by the dissenters in *Keystone*, this could become an exception which would swallow the rule. *Keystone*, 480 U.S. at 512, 107 S.Ct. at 1256, 94 L.Ed.2d at 505 (Rehnquist, J., dissenting).

The Constitution of the United States and of South Carolina provided a just compensation clause for the protection of citizens; surely the framers of these constitutions never intended for this protection to be distinguished away in order to allow States to avoid compensating an individual required to bear a burden which in fairness should be borne by all. Therefore, I simply refuse to accept that the *Mugler* line of cases "grant carte blanche to government agencies to regulate private property into oblivion." Berger, *The Year of the Taking Issue*, 1 B.Y.U.J. Pub.L. 261, 279 (1987). Rather I would hold that some factual situations may lend themselves to the harsh rule in *Mugler*, whereas others must be recognized as situations in which one individual should not be called upon to bear a burden which in fairness should be borne by all. My interpretation of *Keystone* is that a court must first review the public purpose of a regulation. Some regulations will be held unconstitutional because the public purpose for which they are enacted is not deemed to be legitimate or sufficient. Other regulations may provide for the prevention of a nuisance and as such will not require compensation to an affected landowner. Other regulations not designed to prevent a nuisance may nonetheless legitimately advance state

interests and yet require compensation upon a showing of a loss of economically viable use of land.

In my opinion the Beachfront Management Act does not have as its *primary* purpose the prevention of a nuisance and is therefore not subject to the *Mugler* analysis. The activities and effects the Act seeks to prohibit do not rise to such a level as to be fairly considered "noxious." The primary purpose of the Beachfront Management System is to protect and foster the regeneration of the beach/dune system, the benefits of which enure to the State of South Carolina by among other things, promoting tourism, creating a habitat for indigenous flora and fauna, creating a place which harbors natural beauty, and providing a barrier and buffer from high tides, storm surge, hurricanes and normal erosion. The Act also lists other similar findings and policies of the Act. Upon my review of the Act, I conclude that none of these intended purposes can fairly be said to resemble a nuisance. The goals which the Act seeks to accomplish do not appear in any way similar to protecting an important state resource from an infectious disease (*Miller v. Schoene*), prohibiting excavations below the water table for safety purposes (*Goldblatt*), prohibiting an illegal use of a distillery (*Mugler*), preserving the residential integrity of an area by prohibiting a brickyard (*Hadacheck*) or protecting patrons of a downtown area from the unpleasantness associated with a livery stable (*Reinman*). Accordingly, I do not find as did the *Keystone* Court, that the Act at issue here plainly seeks to further "public interest in preventing activities similar to public nuisances" such that it is entitled to the protection afforded by *Mugler*.

This is not to say that the Act itself is invalid. Even though an act is not of the *Mugler* variety, it can remain valid if it nonetheless advances a legitimate state interest. However, if it is not a *Mugler* type act, despite the fact that it advances a legitimate state interest, compensation will be necessary where the act deprives an owner of economically viable use of his land. Lucas has conceded the "laudable" goals of the Act and does not challenge the legitimacy of its public purpose. Thus, the remaining question is whether his property retains economically viable use.

Although, the *Keystone* Court indicated that it could end its analysis with its determination that the Subsidence Act sought to "prevent activities similar to public nuisances," it held that it "need not rest [its] decision on this factor alone, because petitioners have also failed to make a showing of diminution of value sufficient to satisfy the test set forth in *Pennsylvania Coal*[3] and our other regulatory takings cases." *Keystone Bituminous Coal v. Debenedictis*, 480 U.S. at 493, 107 S.Ct. at 1246, 94 L.Ed.2d at 493. The Court did not have to reach the diminution in value question because the only issue left to it by the federal district court was whether the "mere enactment of the statutes and regulations constitutes a taking." *Id*. The next phase of the case would have concerned evidence about the actual effects the Subsidence Act had on the owners' property.

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[3] We note that this is another reference by the *Keystone* Court to the continued vitality of the *Pennsylvania Coal* test.

In assessing the question of whether Lucas retains any economically viable use of his land, we are nonetheless guided by the *Keystone* decision. The *Keystone* court held that the critical distinction in this regard involves a comparison of the value that has been taken from the property with the value that remains in the property. 480 U.S. at 497, 107 S.Ct. at 1248, 94 L.Ed.2d at 496. "[W]here an owner possesses a full bundle of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety." *Id*. [citation omitted]. Applying these factors, the *Keystone* Court determined that

> When the coal that must remain beneath the ground is viewed in the context of any reasonable unit of petitioners' coal mining operations and financial-backed expectations, it is plain that petitioners have not come close to satisfying their burden of proving that they have been denied the economically viable use of that property.

480 U.S. at 499, 107 S.Ct. at 1249, 94 L.Ed.2d at 497. The Court further determined that there was no showing that "petitioners' reasonable investment backed expectations" were materially affected. *Id*.

The facts of *Keystone* contrast sharply with those present in this case. The testimony in this case was that Lucas purchased two lots for development. Lucas planned to erect single family dwellings on the lost and intended to put one-home on the market for sale and retain one for his family. At the time Lucas invested in these lots, his reasonable expectations were that he could proceed with these plans. However, according, to the

testimony of Lucas' appraiser, the Act's prohibition against the erection of any habitable structure caused the value of the lots to plummet to zero. The lost now lack fair market value and there is no economically viable use. Although the Coastal Council introduced testimony that the lost would have some value, its expert was completely unable to explain the method relied upon to arrive at this conclusion. The trial judge chose the conclusion of Lucas' expert over that of the Coastal Council's expert. This Court generally defers to the discretion of the trial judge on these matters because he is in a better position to observe the demeanor of the witnesses and pass on their credibility. Further, from my own review of the record, I find the valuation of Coastal Council's expert to have been totally speculative. Accordingly, since Lucas' land has no fair market value, I would hold that the second part of the test, deprival of economically viable use, has been met and a taking has been established.

Having determined that application of the Act constitutes a taking under the Constitution of the United States, it is not necessary to examine whether it constitutes a taking under the South Carolina Constitution.[4] The

---

[4] There are several South Carolina decisions involving takings under the compensation clause. One of the most recent cases is *Carter v. South Carolina Coastal Council*, 281 S.C. 201, 314 S.E.2d 327 (1984) in which we held that restrictions which disallowed a landowner from filling in wetlands did not constitute a taking. In *Carter*, this Court did not specify whether its analysis of the takings issue was pursuant to federal or state law. Regardless, I do not see *Carter* as controlling under the facts of this case particularly since we must look to federal decisions for the proper interpretations of the United States

(Continued on following page)

remaining question is the appropriate remedy to be afforded the property owner now that a taking has been determined. The most recent amendments to the Act, specifically, S.C. Code Ann. §§ 48-39-290(A)(6) and 48-39-290(D)(1) (Supp.1990), provide that an applicant may request a special permit to build a structure other than an erosion control structure or device seaward of the baseline that is not otherwise allowed pursuant to Sections 48-39-250 through 48-39-360. If Lucas' application is denied, in the alternative, I would hold that Lucas be compensated for the loss of use of the land pursuant to the circuit court order.

Although I affirm the decision of the circuit court that a taking occurred, I would remand the matter to the Coastal Council for its decision as to whether to issue permits in view of the recent 1990 amendments to the Beachfront Management Act for construction of a habitable structure on the lots. If the Council should decline to issue such special permit, I would require that Lucas be compensated pursuant to the circuit court order.

CHANDLER, J., concurs.

(Continued from previous page)

Constitution. In *Carter*, we held that every regulation "will not necessarily be a (taking) in the constitutional sense." Implicit in this is a recognition that there nonetheless will be situations where regulation will be a taking. As indicated by the analysis in this opinion, I would hold that this is one of those situations.

APPENDIX B

SEAL

THE SUPREME COURT OF SOUTH CAROLINA

CLYDE N. DAVIS, JR.
CLERK
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
COLUMBIA, S.C. 29211
PHONE NO. 734-1080

June 17, 1991

Ellison D. Smith, IV, Esquire
P.O. Box 579
Charleston, S.C. 29402-0579

Gedney M. Howe, III
P.O. Box 1034
Charleston, S.C. 29402-1034

Re: David H. Lucas v. South Carolina Coastal Council

Gentlemen:

The Court has refused your Petition for Rehearing in the above case in the following order:

"Petition for Rehearing
denied.

s/ George T. Gregory, Jr. C.J.

s/ Ernest A. Finney, Jr. A.J.

s/ Jean H. Toal A.J.

"Petition for Rehearing
granted.

s/ David W. Harwell A.J.

s/ A. Lee Chandler A.J.

June 17, 1991."

APPENDIX C

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON	IN THE COURT OF COMMON PLEAS C/A No. 88-CP-10-66
DAVID H. LUCAS, Plaintiff, -vs- SOUTH CAROLINA COASTAL COUNCIL, Defendant.	ORDER (Filed August 14, 1989)

This matter came for trial before me in Charleston, South Carolina on August 7, 1989.

The plaintiff, David H. Lucas, is the fee owner of two undeveloped, oceanfront lots located in the Wild Dunes development on the Isle of Palms in Charleston County, South Carolina. The two lots described during the trial as Lots 22 and 24, are in the Beachwood East Subdivision of the Isle of Palms, have road frontage on Beachwood East Drive, are roughly rectangular in shape, and have similar dimensions. Both lots are approximately 90 feet in width and 160 feet in depth. Lucas purchased the two lots on December 3, 1986 and paid $475,000 for Lot 22 and $500,000 for Lot 24. Both sales were arm-lengths transactions. At the time Lucas acquired the lots, it was his intention to build a single-family residence for himself and his family on Lot 24, and to hold Lot 22 as an investment. Prior to July 1, 1988 there were no restrictions

imposed by either the state, the county, or the municipality of the Isle of Palms which would have prevented single-family residential development on either one or both lots. Both lots are mortgaged to the North Carolina National Bank and as of July 1, 1988 the mortgage balance on the two lots was $495,000 and the interest rate on the mortgages was 11%.

Mr. Lucas's planned usage of the lots came to an abrupt halt on July 1, 1988 when the Coastal Zone Management Act was amended by Act 634 of the South Carolina General Assembly commonly known as the Beachfront Management Act. The Act attempts to regulate both present and future development along the coastline of the State of South Carolina by imposing statutorily mandated setback lines along the entire coast. The imaginary lines are referred to in the Beachfront Management Act as a baseline and a setback line. Under the Act's regulatory scheme, no habitable structure or recreational facility can be built seaward of the baseline. In fact, the only type of construction that can take place on the ocean side of the baseline is a walkway to the ocean and a small deck. In essence, undeveloped property located seaward of the baseline, pursuant to the statute, remains forever undeveloped.

The agency which is responsible for administering the Beachfront Management Act is the South Carolina Coastal Council. Following the guidelines of the Act, the South Carolina Coastal Council was and is responsible for establishing the location of the setback lines imposed by the Act. In furtherance of its statutory responsibility, the South Carolina Coastal Council established both a

baseline and a setback line within the Wild Dunes' portion of the Isle of Palms shortly after July 1, 1988, the effective date of the Beachfront Management Act. Lucas's two lots lie entirely seaward of the baseline. In fact, the baseline actually is located on Beachwood East, the road providing access to Lucas's lots.

Because the lines set by the South Carolina Coastal Council under the Beachfront Management Act precluded Lucas from building residences or making any other meaningful use of his two lots, he instituted this action in the Court of Common Pleas for Charleston County in which he asserted that the restrictions on the use of his two lots amounted to a taking of his private property for public purposes entitling him to receive just compensation. Lucas's complaint does not challenge the constitutionality of the Beachfront Management Act, nor does it challenge the right of the General Assembly to regulate the use of his property. Lucas simply maintains that the Act amounts to a condemnation of his property and that he is entitled under the Constitution of the United States of America and the State of South Carolina to just compensation.

The South Carolina Coastal Council, in its answer to Lucas's complaint, denied that a taking had occurred for which the state was required to pay just compensation, but by way of affirmative defense, alleged that if a taking had occurred, Lucas's remedy was not the payment to him of just compensation, but rather some form of administrative remedy which would allow him some use of his property, notwithstanding the provisions of the Beachfront Management Act.

The court, after hearing testimony of the witnesses, reviewing the exhibits introduced into evidence, and hearing arguments of counsel, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I find that David H. Lucas is the owner in fee simple of Lots 22 and 24 on the Isle of Palms, Charleston County, South Carolina, and that he purchased the lots on December 3, 1986 in an arms-length transaction and paid $475,000 for Lot 22 and $500,000 for Lot 24.

I find that at the time Lucas purchased the two lots, both were zoned for single-family residential construction and that there were no restrictions imposed upon such use of the property by either the State of South Carolina, the County of Charleston, or the Town of the Isle of Palms.

I find that the two lots in question are rectangular in shape and are approximately ninety feet in width and one hundred sixty feet in depth, and as of July 1, 1988, the distance from the seaward lines of both lots to the mean high water mark of the Atlantic Ocean was approximately one hundred yards.

I find that Lot 22 is separated from Lot 24 by Lot 23.

I find that Lot 23 is under separate ownership and is improved with a substantial single-family residence which was built in the early 1980's. I further find that there are single-family residences on similar oceanfront lots both to the east and west of Lots 22 and 24.

I find that the real property taxes on both Lots 22 and 24 are in the amount of $1,700 a year per lot and that there are no taxes currently owing on either lot.

I find that as of July 1, 1988, a mortgage existed on both lots in the principal amount of $495,000 with an interest rate of 11% and that Lucas is current with his monthly mortgage payments.

I find that in the past there have been incidences of spot erosion in the vicinity of Lucas's two lots and that the worst recent erosion occurred in 1983. Since that time, accretion has continued in this area.

I find that as of July 1, 1988, neither lot can be utilized for single-family residential construction and further that the only construction that can now take place on either lot is the erection of a walkway over the sand dunes or a small deck.

I find that the prohibition on construction imposed on these two lots is permanent.

I find and the parties have so stipulated for the purposes of this case, that the setback lines established by the Coastal Council are final lines and will not be moved.

I find that the imposition of building restrictions on Lots 22 and 24 imposed by the South Carolina Coastal Council deprives Lucas of any reasonable economic use of the lots, has eliminated the unrestricted right of use, and renders them valueless.

I find that Lucas paid the aggregate sum of $975,000 for the two lots on December 3, 1986.

I find that as of July 1, 1988, the aggregate fair market value of the two lots was $1,170,000 or $585,000 per lot.

I find that Lucas had paid interest since July 1, 1988 in the amount of $58,987.50 on the mortgages covering said properties.

Both Article I, Section 13 of the South Carolina Constitution and the Fifth Amendment to the United States Constitution are limitations on the power of the sovereign. Both constitutional provisions provide that if private property is taken for public use, just compensation must be paid. It is self-evident that the two oceanfront lots owned by Lucas are private property in the most traditional sense of the term and it is equally self-evident that the Beachfront Management Act was enacted to preserve the state's beaches for the benefit of the general public. The effect of the setback line imposed by the Beachfront Management Act on Lucas's two lots is to render property which was otherwise perfectly suitable for single-family residential development valueless. The damage to the two lots by virtue of the restrictions prohibiting any form of development is total.

Nearly fifty years ago our court in *Gasque v. The Town of Conway*, 194 S.C. 15, 8 S.E.2d 871 (1940), defined the essential elements constituting ownership of private property:

> Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal. Anything which destroys one or more of these elements of property to that extent destroys the property itself. It must be conceded that the substantial value of property lies in its use. (cite

> omitted) If the right of use be denied, the value of the property is annihilated, and ownership is rendered a barren right.
>
> The constitutional prohibition against taking private property for public use without just compensation must have been intended to protect all the essential elements of ownership which make property valuable, including, of course, the right of user, and the right of enjoyment. 9 S.E.2d at 873.

It is manifest that the South Carolina Coastal Council in its enforcement of the Beachfront Management Act has deprived Lucas of all of the essential elements of ownership.

As to the contention by the defendant that this court should remand this matter for further administrative purposes, the controlling Act does not indicate this to be proper under the facts of this case. Furthermore, the Constitutional provisions under which plaintiff claims, have long been held to be self-executing and does not require independent statutory authorization.

While there has been no physical invasion of Lucas's property by the State of South Carolina such as you have when the state condemns property to build roads, for example, the damage is nonetheless severe because of the regulation of the use of the property. Our court has long recognized that governmental regulation can amount to a taking of private property. *E.G., Hill v. City of Hanahan*, 281 S.C. 201, 314 S.E.2d 327 (Ct. App. 1984); *Painter v. Town of Forrest Acres*, 231 S.C. 56, 97 S.E.2d 71 (1957); *Henderson v. City of Greenwood*, 172 S.C. 16, 172 S.E.2d 689 (1934). Recently, the United States Supreme Court has

also held that regulatory activity by a governmental agency which denies an owner economically viable use of his land amounts to a taking under the Fifth Amendment of the United States Constitution for which just compensation must be paid. *First English Evangelical Lutheran Church v. County of Los Angeles*, ___ U.S. ___, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987); *see also, Nollan v. California Coastal Commission*, ___ U.S. ___, 107 S.Ct. 3141, 96 L.Ed.2d ___ (1987).

It is manifest that the imposition of the setback lines by the Coastal Council have resulted in a total taking of Lucas's two beachfront lots. Accordingly, Lucas is entitled under both the State and Federal Constitutions to the payment of just compensation. Based upon my finding of facts above, I conclude that just compensation includes the following:

(a) Fair market value of the two lots as of July 1, 1988, in the amount of $1,170,000;

(b) Real property taxes paid on the property since July 1, 1988, in the amount of $3,400;

(c) Simple interest on the mortgage balance of $495,000 at 11% in the amount of $58,987.50.

Obviously, since the State has totally acquired Lucas's property, it is entitled to a deed to the property free and clear of any incumbrances.

Based upon the foregoing,

IT IS, THEREFORE, ORDERED that plaintiff have judgment against the defendant in the sum of $1,232,387.50, plus interest at the legal rate until the judgment is satisfied;

IT IS FURTHER ORDERED that upon satisfaction of the judgment the plaintiff is ordered to tender deeds to Lots 22 and 24 to the State of South Carolina or its designee.

AND IT IS SO ORDERED.

/s/ _____
Presiding Judge,
Ninth Judicial Circuit

Charleston, South Carolina

8-10, 1988

ATTEST: A TRUE COPY
HOWARD A. TAYLOR (SEAL)
CLERK, C. P. & C. S.
By Scott Brown
DEPUTY CLERK

APPENDIX D

CHAPTER 39
Coastal Tidelands and Wetlands

SEC.

48-39-10. Definitions.

48-39-20. Legislative declaration of findings.

48-39-30. Legislative declaration of state policy.

48-39-40. Creation of South Carolina Coastal Council; members; terms.

48-39-50. Powers and duties of Council.

48-39-60. Personnel provided by Wildlife and Marine Resources Department.

48-39-70. Cooperation of other agencies and commissions; administration of oaths; subpoenas.

48-39-80. Development of coastal management program.

48-39-90. Public hearings on management plan.

48-39-100. Plan developed in cooperation with local governments.

48-39-110. Submission of plan by State Ports Authority.

48-39-120. Development of beach erosion control policy; issuance of permits for erosion control structures; removal of structures; limitation on development of property.

48-39-130. Permits required to utilize critical areas.

48-39-140. Submission of development plans; application for permits.

48-39-145. Application fee for permit to alter critical area; disposition of proceeds.

48-39-150. Approval or denial of permits; appeal to Council.

48-39-160. Violations; jurisdiction of courts.

48-39-170. Penalties.

48-39-180. Judicial review of permit determinations.

48-39-190. Lands not affected by chapter.

48-39-200. Restriction of Council's regulatory authority.

48-39-210. Council only state agency authorized to permit or deny alterations or utilizations within critical areas.

48-39-220. Legal action to determine interest in tidelands.

§ 48-39-10. Definitions.

As used in this chapter:

(A) "Applicant" means any person who files an application for a permit under the provisions of this chapter.

(B) "Coastal zone" means all coastal waters and submerged lands seaward to the State's jurisdictional limits and all lands and waters in the counties of the State which contain any one or more of the critical areas. These counties are Beaufort, Berkeley, Charleston, Colleton, Dorchester, Horry, Jasper and Georgetown.

(C) "Council" means the South Carolina Coastal Council.

(D) "CCPS" means Coastal Council Permitting Staff.

(E) "Saline waters" means those waters which contain a measurable quantity of sea water, at least one part chloride ion per thousand.

(F) "Coastal waters" means the navigable waters of the United States subject to the ebb and flood of the tide and which are saline waters, shoreward to their mean high-water mark. *Provided*, however, that the Council may designate boundaries which approximate the mean extent of saline waters until such time as the mean extent of saline waters can be determined scientifically.

(G) "Tidelands" means all areas which are at or below mean high tide and coastal wetlands, mudflats, and similar areas that are contiguous or adjacent to coastal waters and are an integral part of the estuarine systems involved. Coastal wetlands include marshes, mudflats, and shallows and means those areas periodically inundated by saline waters whether or not the saline waters reach the area naturally or through artificial water courses and those areas that are normally characterized by the prevalence of saline water vegetation capable of growth and reproduction. *Provided*, however, nothing in this definition shall apply to wetland areas that are not an integral part of an estuarine system. Further, until such time as the exact geographic extent of this definition can be scientifically determined, the Council shall have the authority to designate its approximate geographic extent.

(H) "Beaches" means those lands subject to periodic inundation by tidal and wave action so that no nonlittoral vegetation is established.

(I) "Primary ocean frot sand dunes" means those dunes which constitute the front row of dunes adjacent to the Atlantic Ocean.

(J) "Critical area" means any of the following: (1) coastal waters, (2) tidelands, (3) beaches and (4) primary ocean from sand dunes.

(K) "Person" means any individual, organization, association, partnership, business trust, estate trust, corporation, public or municipal corporation, county, local government unit, public or private authority and shall include the State of South Carolina, its political subdivisions and all its departments, boards, bureaus or other agencies, unless specifically exempted by this chapter.

(L) "Estuarine sanctuary" means a research area designated as an estuarine sanctuary by the Secretary of Commerce.

(M) "Marine sanctuary" means any water and wetland areas designated as a marine sanctuary by the Secretary of Commerce.

(N) "Minor development activities" means the construction, maintenance, repair or alteration of any private piers or erosion control structure, the construction of which does not involve dredge activities.

(O) "Dredging" means the removal or displacement by any means of soil, sand,

gravel, shells or other material, whether of intrinsic value or not, from any critical area.

(P) "Filling" means either the displacement of saline waters by the depositing into critical areas of soil, sand, gravel, shells or other material or the artificial alteration of water levels or water currents by physical structure, drainage ditches or otherwise.

(Q) "Submerged lands" means those river, creek and ocean bottoms lying below mean low-water mark.

(R) "Oil" means crude petroleum oil and all other hydrocarbons, regardless of specific gravity, that are produced in liquid form by ordinary production methods, but does not include liquid hydrocarbons that were originally in a gaseous phase in the reservoir.

(S) "Gas" means all natural gas and all other fluid hydrocarbons not hereinabove defined as oil, including condensate because it originally was in the gaseous phase in the reservoir.

(T) "Fuel" means gas and oil.

(U) "Emergency" means any unusual incident resulting from natural or unnatural causes which endanger the health, safety or resources of the residents of the State, including damages or erosion to any beach or shore resulting from a hurricane, storm or other such violent disturbance.

HISTORY: 1977 Act No. 123 § 3.

Research and Practice References –

Barrier Islands: The Conflict Between Federal Programs That Promote Preservation and Those That Promote Development. 33 SC L Rev 373, December 1981.

ATTORNEY GENERAL'S OPINIONS

The first part of the definition of "tielands" as it appears in Act No. 123 of 1977 includes fresh and saline waters but is limited to areas that are an integral part of an estuarine system. 1976-77 Op Atty Gen. No. 77-257, p. 190.

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§ 48-39-20. Legislative declaration of findings.

The General Assembly finds that:

(A) The coastal zone is rich in a variety of natural, commercial, recreational and industrial resources of immediate and potential value to the present and future well-being of the State.

(B) The increasing and competing demands upon the lands and waters of our coastal zone occasioned by population growth and economic development, including requirements for industry, commerce, residential development, recreation, extraction of mineral resources and fossil fuels, transportation and navigation, waste disposal and harvesting of fish, shellfish and other living marine resources have resulted in

the decline or loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use and shoreline erosion.

(C) A variety of federal agencies presently operate land use controls and permit systems in the coastal zone. South Carolina can only regain control of the regulation of its critical areas by developing its own management program. The key to accomplishing this is to encourage the state and local governments to exercise their full authority over the lands and waters in the coastal zone.

(D) The coastal zone and the fish, shellfish, other living marine resources and wildlife therein, may be ecologically fragile and consequently extremely vulnerable to destruction by man's alterations.

(E) Important ecological, cultural, natural, geological and scenic characteristics, industrial, economic and historical values in the coastal zone are being irretrievably damaged or lost by ill-planned development that threatens to destroy these values.

(F) In light of competing demands and the urgent need to protect and to give high priority to natural systems in the coastal zone while balancing economic interests, present state and local institutional arrangements for planning and regulating land and water uses in such areas are inadequate.

HISTORY: 1977 Act No. 123 § 1.

Cross references –

As to soil and water conservation districts, *see* Chapter 9 of Title 48.

As to tax credits for construction and installation or restoration of water impoundments and water control structures, *see* § 12-7-617.

As to waters, water resources and drainage, *see* Title 49.

As to fish, game and watercraft, generally, *see* Title 50.

As to Coastal Fisheries Law, *see* Chapter 17 of Title 50.

As to ports and maritime matters, *see* Title 54.

Research and Practice References –

Which Way to the Beach? Public Access to Beaches for Recreational Use, 29 SC L Rev 627.

The South Carolina Coastal Zone Act of 1977, 29 SC L Rev 666.

§ 48-39-30. Legislative declaration of state policy.

(A) The General Assembly declares the basic state policy in the implementation of this chapter is to protect the quality of the coastal environment and to promote the economic and social improvement of the coastal zone and of all the people of the State.

(B) Specific state policies to be followed in the implementation of this chapter are:

(1) To promote economic and social improvement of the citizens of this State and to encourage development of coastal resources in order to achieve such improvement with due consideration for the environment and within the framework of a coastal planning program that is designed to protect the sensitive and fragile areas from inappropriate development and provide adequate environmental safeguards with respect to the construction of facilities in the critical areas of the coastal zone;

(2) To protect and, where possible, to restore or enhance the resources of the State's coastal zone for this and succeeding generations;

(3) To formulate a comprehensive tidelands protection program;

(4) To formulate a comprehensive beach erosion and protection policy including the protection of necessary sand dunes.

(5) To encourage and assist state agencies, counties, municipalities and regional agencies to exercise their responsibilities and powers in the coastal zone through the development and implementation of comprehensive programs to achieve wise use of coastal resources giving full consideration to ecological, cultural and historic values as well as to the needs for economic and social development and resources conservation.

(C) In the implementation of the chapter, no government agency shall adopt a rule or regulation or issue

any order that is unduly restrictive so as to constitute a taking of property without the payment of just compensation in violation of the Constitution of this State or the United States.

(D) Critical areas shall be used to provide the combination of uses which will insure the maximum benefit to the people, but not necessarily a combination of uses which will generate measurable maximum dollar benefits. As such, the use of a critical area for one or a combination of like uses to the exclusion of some or all other uses shall be consistent with the purposes of this chapter.

(E) It shall be the policy of the State to coordinate the coastal planning and management program effort with other coastal states and organizations of coastal states.

HISTORY: 1977 Act No. 123 § 2.

Research and Practice References –

Which Way to the Beach? Public Access to Beaches for Recreational Use, 29 SC L Rev 627.

The South Carolina Coastal Zone Act of 1977, 29 SC L Rev 666.

§ 48-39-40. Creation of South Carolina Coastal Council; members; terms.

(A) There is hereby created the South Carolina Coastal Council which shall consist of eighteen members as follows: Eight members, one from each coastal zone

county, to be appointed by the local county governing body; six members, one from each of the congressional districts of the State, to be elected by a majority vote of the members of the House of Representatives and the Senate representing the counties in such district, each such House or Senate member to have one vote; and the following legislative members who shall serve ex officio: Two state Senators, one to be appointed by the President of the Senate and one to be elected by the Senate Fish, Game and Forestry Committee; and two members of the House of Representatives to appointed by the Speaker of the House. The Council shall elect a chairman, vice-chairman and such other officers as it deems necessary.

(B) Terms of legislative members shall be coterminous with their terms as members of the General Assembly. Terms of all non-legislative members shall be for four years and until successors are appointed and qualify, except that of those initially appointed three of the members appointed by county governing bodies and two members from congressional districts shall serve terms of two years only as determined by lot at the first meeting of the Council. Vacancies shall be filled in the original manner of selection for the unexpired term.

HISTORY: 1977 Act No. 123 § 4.

Research and Practice References –

Which Way to the Beach? Public Access to Beaches for Recreational Use, 29 SC L Rev 627.

The South Carolina Coastal Zone Act of 1977, 29 SC L Rev 666.

ATTORNEY GENERAL'S OPINIONS

The provision of § 48-39-40 of the Code of Laws of South Carolina, 1976, as amended, which provides that members of the Legislature shall serve as *ex officio* members of the South Carolina Coastal Council violates the Separation of Powers Doctrine, Article I, Section 8, of the Constitution of the State of South Carolina. 1982 Op Atty Gen. No 82-26, p. 31.

§ 48-39-50. Powers and duties of Council.

The Council shall have the following powers and duties:

(A) To employ the CCPS consisting of, but not limited to, the following professional members: An administrator and other staff members to include those having expertise in biology, civil and hydrological engineering, planning, environmental engineering and environmental law.

(B) To apply for, accept and expend financial assistance from public and private sources in support of activities undertaken pursuant to this chapter and the Federal Coastal Zone Management Act of 1972.

(C) To undertake the related programs necessary to develop and recommend to the Governor and the General Assembly a comprehensive program designed to promote the policies set forth in this chapter.

(D) To hold public hearings and related community forums and afford participation in the development of management programs

to all interested citizens, local governments and relevant state and federal agencies, port authorities and other interested parties.

(E) To promulgate necessary rules and regulations to carry out the provisions of this chapter.

(F) To administer the provisions of this chapter and all rules, regulations and orders promulgated under it.

(G) To examine, modify, approve or deny applications for permits for activities covered by the provisions of this chapter.

(H) To revoke and suspend permits of persons who fail or refuse to carry out or comply with the terms and conditions of the permit.

(I) To enforce the provisions of this chapter and all rules and regulations promulgated by the Council and institute or cause to be instituted in courts of competent jurisdiction of legal proceedings to compel compliance with the provisions of this chapter.

(J) To manage estuarine and marine sanctuaries and regulate all activities therein, including the regulation of the use of the coastal waters located within the boundary of such sanctuary.

(K) To establish, control and administer pipeline corridors and locations of pipelines used for the transportation of any fuel on or in the critical areas.

(L) To direct and coordinate the beach and coastal shore erosion control activities

among the various state and local governments.

(M) To implement the state policies declared by this chapter.

(N) To encourage and promote the cooperation and assistance of state agencies, coastal regional councils of government, local governments, federal agencies and other interested parties.

(O) To exercise all incidental powers necessary to carry out the provisions of this chapter.

(P) To coordinate the efforts of all public and private agencies and organizations engaged in the making of tidal surveys of the coastal zone of this State with the object of avoiding unnecessary duplication and overlapping.

(Q) To serve as a coordinating state agency for any program of tidal surveying conducted by the federal government.

(R) To develop uniform specifications and regulations for tidal surveying.

(S) To monitor, in coordination with the South Carolina Department of Wildlife and Marine Resources, the waters of the State for oil spills. If such Department observes an oil spill in such waters it shall immediately report such spill to the South Carolina Department of Health and Environmental Control, the United States Coast Guard and Environmental Protection Agency. This in no way negates the responsibility of the spiller to report a spill.

(T) To direct, in coordination with the South Carolina Department of Health and Environmental Control as the designated state agency to provide liaison to the regional response team, pursuant to Section 1510.23 of the National Contingency Plan, state supervised removal operations of oil discharged into the waters within the territorial jurisdiction of this State and entering such waters after being discharged elsewhere within the State, and to seek reimbursement from the National Contingency Fund for removal operations cost expended by it and all other agencies and political subdivisions including county, municipal and regional governmental entities in removing such oil as provided for in Section 311(C)(2) of the Federal Water Pollution Control Act.

(U) To act as advocate, where the Council deems such action appropriate, on behalf of any person who is granted a permit for a specific development by the Council but is denied a permit by a federal agency for the same specific development.

(V) To delegate any of its powers and duties to the CCPS.

HISTORY: 1977 Act No. 123 § 5.

Federal Aspects –

As to Federal Coastal Zone Management Act, see 16 USCS §§ 1451 et seq.

As to Federal Water Pollution Control Act, see 33 USCS §§ 1251 et seq.

As to National Contingency Plan, see 40 CFR Part 1510.

ATTORNEY GENERAL'S OPINIONS

The responsibility for cleaning up chemical and petroleum spills which occur in this State rests upon the polluter. 1981 Op Att'y Gen. No. 81-83, p 107.

§ 48-39-60. Personnel provided by Wildlife and Marine Resources Department.

When requested by the Council, the Wildlife and Marine Resources Department shall provide additional staff for the Council, including any additional conservation officers, necessary to administer the provisions of this chapter and for which funds are available.

HISTORY: 1977 Act No. 123 § 6.

Cross references –

As to composition and organization of Wildlife and Marine Resources Department, see Article 1 of Chapter 3 of Title 50.

§ 48-39-70. Cooperation of other agencies and commissions; administration of oaths; subpoenas.

(A) All other state and local agencies and commissions shall cooperate with the Council in the administration of enforcement of this chapter. All agencies currently exercising regulatory authority in the coastal zone shall administer such authority in accordance with the provisions of this chapter and rules and regulations promulgated thereunder.

(B) The Council in the discharge of its duties may administer oaths and affirmations, take depositions and issue subpoenas to compel the attendance of witnesses and the production of books, papers, correspondence, memoranda and other records deemed necessary in connection with the work of the Council. The only exception shall be, that information considered proprietary by the applicant. If in the opinion of the Council a proper decision cannot be rendered without the submission of such proprietary information, the Council shall be empowered to execute an agreement on confidentiality with the applicant and such information shall not be made a part of the public record of current or future proceedings.

(C) In case the contumacy by any person or refusal to obey a subpoena issued to any person, any circuit court of this State or circuit judge thereof within the jurisdiction of which such person guilty of contumacy or refusal to obey is found, resides or transacts business, upon application by the Council, may issue to such person an order requiring him to appear before the Council to produce evidence if so ordered or give testimony touching the matter under investigation. Any failure to obey an order of the court may be punished as a contempt hereof. Subpoenas shall be issued in the name of the Council and signed by the Council chairman. Subpoenas shall be issued to such persons as the Council may designate.

HISTORY: 1977 Act No. 123 § 7.

Research and Practice References –

Barrier Islands: The Conflict Between Federal Programs That Promote Preservation and Those That Promote Development. 33 SC L Rev 373, December 1981.

§ 48-39-80. Development of coastal management program.

The council shall develop a comprehensive coastal management program, and thereafter have the responsibility for enforcing and administering the program in accordance with the provisions of this chapter and any rules and regulations promulgated under this chapter. In developing the program the Council shall:

(A) Provide a regulatory system which the Council shall use in providing for the orderly and beneficial use of the critical areas.

(B) In devising the management program the Council shall consider all lands and waters in the coastal zone for planning purposes. In addition, the Council shall:

(1) Identify present land uses and coastal resources.

(2) Evaluate these resources in terms of their quality, quantity and capability for use both now and in the future.

(3) Determine the present and potential uses and the present and potential conflicts in uses of each coastal resource.

(4) Inventory and designate areas of critical state concern within the coastal

zone, such as port areas, significant natural and environmental, industrial and recreational areas.

(5) Establish broad guidelines on priority of uses in critical areas.

(6) Provide for adequate consideration of the local, regional, state and national interest involved in the siting of facilities for the development, generation, transmission and distribution of energy, adequate transportation facilities and other public services necessary to meet requirements which are other than local in nature.

(7) Provide for consideration of whether a proposed activity of an applicant for a federal license or permit complies with the State's coastal zone program and for the issuance of notice to any concerned federal agency as to whether the State concurs with or objects to the proposed activity.

(8) Provide for a review process of the management plan and alterations thereof that involves local, regional, state and federal agencies.

(9) Conduct other studies and surveys as may be required, including the beach erosion control policy as outlined in this chapter.

(10) Devise a method by which the permitting process shall be streamlined and simplified so as to avoid duplication.

(11) Develop a system whereby the Council shall have the authority to review all state and federal permit applications in the coastal zone, and to certify that these do not contravene the management plan.

(C) Provide for a review process of the management program and alterations that involve interested citizens as well as local, regional, state and federal agencies.

(D) Consider in conjunction with the Department of Health and Environmental Control the planning and review of existing water quality standards and classifications in the coastal zone.

(E) Provide consideration for nature-related users of critical areas, such as aquaculture, mariculture, waterfowl and wading bird management, game and nongame habitat protection projects and endangered flora and fauna.

HISTORY: 1977 Act No. 123 § 8.

§ 48-39-90. Public hearings on management plan.

(A) The Council, on thirty days' notice, shall hold statewide public hearings on the proposed coastal zone management plan to obtain the views of all interested parties, particularly all interested citizens, agencies, local governments, regional organizations and port authorities.

(B) All Council documents associated with such hearings shall be conveniently available to the public for review and study at least thirty days prior to a hearing. A

report on each hearing shall be prepared and made available to the public within forty-five days of such hearing.

(C) After sufficient hearings and upon consideration of the views of interested parties the Council shall propose a final management plan for the coastal zone to the Governor and the General Assembly.

(D) Upon review and approval of the proposed management plan by the Governor and General Assembly, the proposed plan shall become the final management plan for the State's coastal zone.

(E) Any change in or amendment to the final management plan shall be implemented by following the procedures established in subsections (A), (B), (C) and (D) of this section and upon the review and approval of the Governor and the General Assembly.

HISTORY: 1977 Act No. 123 § 9.

§ 48-39-100. Plan developed in cooperation with local governments.

(A) The management program specified in § 48-39-90 shall be developed in complete cooperation with affected local governments in the coastal zone. This cooperation shall include, but not be limited to:

(1) Involvement of local governments or their designees in the management program.

(2) Provision of technical assistance and grants to aid local governments in carrying out their responsibilities under this chapter.

(3) Dissemination of improved informational data on coastal resources to local and regional governmental units.

(4) Recommendations to local and regional governmental units as to needed modifications or alterations in local ordinances that become apparent as a result of the generation of improved and more comprehensive information.

(B) Any city or county that is currently enforcing a zoning ordinance, subdivision regulation or building code, a part of which applies to critical areas, shall submit the elements of such ordinances and regulations applying to critical areas to the Council for review. The Council shall evaluate such ordinances and plans to determine that they meet the provisions of this chapter and rules and regulations promulgated hereunder. Upon determination and approval by the Council, such ordinances and regulations shall be adopted by the Council, followed by the Council in meeting its permit responsibilities under this chapter and integrated into the Council's Coastal Management Program. Any change or modification in the elements of approved zoning ordinances, subdivision regulations or building codes applying to critical areas shall be disapproved by the Council if it is not in compliance with the provisions of this chapter and rules and regulations promulgated hereunder.

(C) Any city or county that is not currently enforcing ordinances or regulations on the critical areas within its jurisdiction at its option may elect to develop a management program for such critical areas by notifying the Council of its intent within one hundred and eighty days

following the 24th day of May, 1977. Such proposed ordinances and regulations applying to critical areas shall be subject to the process specified in § 48-39-100(B).

(D) Any county or city may delegate some or all of its responsibilities in developing a coastal management program for critical areas under its jurisdiction to the regional council of government of which it is a part, provided the county or city has notified the Council in writing at least thirty days prior to the date on which such action is to be taken.

HISTORY: 1977 Act No. 123 § 10.

§ 48-39-110. Submission of plan by State Ports Authority.

The South Carolina State Ports Authority shall prepare and submit to the Council a management plan for port and harbor facilities and navigation channels. Upon approval by the Council of such management plan it shall become part of the comprehensive coastal management program developed by the Council. The South Carolina State Ports Authority shall include in the management plan a designation of the geographical area appropriate for use by public and private port and harbor facilities and military and naval facilities and submit this to the Council for approval.

HISTORY: 1977 Act No. 123 § 11.

Cross references –

As to purposes and powers of South Carolina State Ports Authority, generally, see Article 3 of Chapter 3 of Title 54.

ATTORNEY GENERAL'S OPINIONS

The South Carolina Ports Authority and the South Carolina Public Service Authority do not come within the definition of State agency as that term is used by the General Assembly in § 24 of the General Appropriations Act 1978-1979. 1978 Op Att'y Gen, No 78-210, p 243.

§ 48-39-120. Development of beach erosion control policy; issuance of permits for erosion control structures; removal of structures; limitation on development of property.

(A) The Council shall develop and institute a comprehensive beach erosion control policy that identifies critical erosion areas, evaluates the benefits and costs of erosion control structures funded by the State, considers the dynamic littoral and offshore drift systems, sand dunes and like items.

(B) The Council for and on behalf of the State may issue permits for erosion control structures following the provisions of this section and §§ 48-39-140 and 48-39-150, on or upon the tidelands and coastal waters of this State as it may deem most advantageous. *Provided*, however, that no property rebuilt or accreted as a result of natural forces or as a result of a permitted structure shall exceed the original property line or boundary. *Provided*, further that no person or governmental agency may develop ocean front property accreted by natural forces or as the result of permitted or nonpermitted structures beyond the mean high water mark as it existed at the time the ocean front property was initially developed or subdivided, and such property shall remain the property of the State held in trust for the people of the State.

(C) The Council shall have the authority to remove all erosion control structures which have an adverse effect on the public interest.

(D) The Council is authorized for and in behalf of the State to accept such federal monies for beach or shore erosion control in areas to which the public has full and complete access as are available and to sign all necessary agreements and to do and perform all necessary acts in connection therewith to effectuate the intent and purposes of such federal aid.

(E) If a beach or shore erosion emergency is declared by the Council, the State, acting through the Council, may spend whatever state funds are available to alleviate beach or shore erosion in areas to which the public has full and complete access, including any funds which may be specifically set aside for such purposes.

(F) The Council, for and on behalf of the State, may issue permits not otherwise provided by state law, for erosion and water drainage structure in or upon the tidelands, submerged lands and waters of this State below the mean high-water mark as it may deem most advantageous to the State for the purpose of promoting the public health, safety and welfare, the protection of public and private property from beach and shore destruction and the continued use of tidelands, submerged lands and waters for public purposes.

HISTORY: 1977 Act No. 123 § 12.

Cross references –

As to the applicability of the Erosion and Sediment Reduction Act, *see* § 48-18-30.

Research and Practice References –

Which way to the Beach? Public Access to Beaches for Recreational Use. 29 SC L. Rev. 627.

The South Carolina Coastal Zone Act of 1977. 29 SC L Rev 666.

§ 48-39-130. Permits required to utilize critical areas.

(A) Ninety days after July 1, 1977, no person shall utilize a critical area for a use other than the use the critical area was devoted to on such date unless he has first obtained a permit from the Council.

(B) Within sixty days of July 1, 1977, the Council shall publish and make available the interim rules and regulations it will follow in evaluating permit applications. These interim rules and regulations shall be used in evaluating the granting or denying all permit applications until such time as the final rules and regulations are adopted in accordance with this section and Chapter 23 of Title 1. Within one hundred and twenty days of July 1, 1988 the Council shall publish and make available to local and regional governments and interested citizens for review and comment a draft of the final rules and regulations it will follow in evaluating permit applications. Sixty days after making such guidelines available the Council shall hold a public hearing affording all interested persons an opportunity to comment on such guidelines. Following the public hearing the Council shall in ninety days publish final rules and regulations. *Provided*, however, the interim rules and regulations shall not be subject to the provisions of Chapter 23 of Title 1.

(C) Ninety days after July 1, 1977 no person shall fill, remove, dredge, drain or erect any structure on or in any way alter any critical area without first obtaining a permit from the Council. *Provided*, however, that a person who had legally commenced a use such as those evidenced by a state permit, as issued by the Budget and Control Board, or a project loan approved by the rural electrification administration or a local building permit or has received a United States Corps of Engineers or Coast Guard permit, where applicable, may continue such use without obtaining a permit. Any person may request the Council to review any project or activity to determine if he is exempt under this section from the activity to determine if he is exempt under this section from the provisions of this chapter. The Council shall make such determinations within forty-five days from the receipt of any such request.

(D) It shall not be necessary to apply for a permit for the following activities:

(1) The accomplishment of emergency orders of any duly appointed official of a county, municipality or of the State, acting to protect the public health and safety, upon notification to the Council.

(2) Hunting, erecting duckblinds, fishing, shellfishing and trapping when and where otherwise permitted by law; the conservation, repletion and research activities of state agencies and educational institutions or boating or other recreation provided that such activities cause no material harm to the flora, fauna, physical or aesthetic resources of the area.

(3) The discharge of treated effluent as permitted by law; *provided*, however, that the Council shall have the authority to review and comment on all proposed permits that would affect critical areas.

(4) Dredge and fill performed by the United States Corps of Engineers for the maintenance of the harbor channels and the collection and disposal of the materials so dredged; *provided*, however, that the Council shall have authority to review and certify all such proposed dredge and fill activities.

(5) Construction of walkways over sand dunes in accordance with regulations promulgated by the Council.

(6) Emergency repairs to any existing bank, dike or structure which has been erected in accordance with federal and state laws, including fishing piers which are provided for by general law or acts passed by the General Assembly of South Carolina: *provided*, however that notice shall be given to the Council, within seventy-two hours from the onset of needed repairs.

(7) Maintenance and repair of drainage and sewer facilities constructed in accordance with federal or state laws and normal maintenance and repair of any utility or railroad.

(8) Normal maintenance or repair to any pier or walkway provided that such maintenance or repair not involve dredge or fill.

(9) Construction or maintenance of a major utility facility where the utility has

obtained a certificate for such facility under. "The Utility Facility Siting and Environmental Protection Act", Chapter 33 of Title 58 of the 1976 Code. *Provided*, however, that the South Carolina Public Service Commission shall make the Council a party to certification proceedings for utility facilities within the coastal zone.

HISTORY: 1977 Act No. 123 § 13; 1982 Act No. 410, § 1.

Research and Practice References –

Which way to the Beach? Public Access to Beaches for Recreational Use. 29 SC L Rev 627.

The South Carolina Coastal Zone Act of 1977, 29 SC L Rev 666.

CASE NOTES

South Carolina State Parts Authority had legally commenced use and was entitled to exemption from requirement that it obtain permit from South Carolina Coastal Council for Wando River Project, where port authority had received state permits from Budget and Control Board within time specified in § 48-39-130(c), even though project had not yet broken ground. South Carolina State Ports Authority v South Carolina Coastal Council, 270 SC 320, 242 SE2d 225 (1978).

§ 48-39-140. Submission of development plans; application for permits.

(A) Any person who wishes may submit development plans to the Council for preliminary review. If a

permit is necessary, the Council will make every effort to assist the application in expediting the permit application.

(B) Each application for a permit shall be filed with the Council and shall include:

(1) Name and address of the applicant.

(2) A plan or drawing showing the applicant's proposal and the manner or method by which the proposal shall be accomplished.

(3) A plat of the area in which the proposed work will take place.

(4) A copy of the deed, lease or other instrument under which the applicant claims title, possession or permission from the owner of the property, to carry out the proposal.

(5) A list of all adjoining landowners and their addresses or a sworn affidavit that with due diligence such information is not ascertainable.

(C) The Council within thirty days of receipt of an application for a permit shall notify, in writing, interested agencies, all adjoining landowners, local government units in which the land is located and other interested persons of the application and shall indicate the nature of the applicant's proposal. Public notice shall be given at least once by advertisement in state and local newspapers of general circulation in the area concerned. The Council may hold a public hearing on applications which have any effect on a critical area if it deems a hearing necessary. The public hearing shall be held in the county where the land is located and if in more than one county the

Council shall determine in which county to hold the hearing or may hold hearings in both counties.

Provided, all interested agencies, all adjoining landowners, local government units and other interested persons shall have thirty days to file a written comment to such application after receipt of any such notice by the Council.

HISTORY: 1977 Act No. 123 § 14.

§ 48-39-145. Application fee for permit to alter critical area; disposition of proceeds.

(A) The South Carolina Coastal Council may charge an administrative fee upon application for a permit for alteration of any critical area as defined in § 48-39-10. Applications for permits which are noncommercial/non-industrial in nature and provide personal benefits that have no connection with a commercial/industrial enterprise shall be charged an administrative fee not to exceed fifty dollars. A reasonable fee, determined by the South Carolina Coastal Council, will be charged for permit applications when the planned or ultimate purpose of the activity is commercial or industrial in nature.

(B) Any fees collected under this provision shall be forwarded to the State Treasurer for credit to the general fund.

HISTORY: 1982 Act No. 466 Part II § 19.

§ 48-39-150. Approval or denial of permits; appeal to Council.

(A) In determining whether a permit application is approved or denied the Council shall base its determination on the individual merits of each application, the policies specified in §§ 48-39-20 and 48-39-30 and be guided by the following general considerations:

(1) The extent to which the activity requires a waterfront location or is economically enhanced by its proximity to the water.

(2) The extent to which the activity would harmfully obstruct and natural flow of navigable water. If the proposed project is in one or more of the State's harbors or in a waterway used for commercial navigation and shipping or in an area set aside for port development in an approved management plan, then a certificate from the South Carolina State Ports Authority declaring the proposed project or activity would not unreasonably interfere with commercial navigation and shipping must be obtained by the Council prior to issuing a permit.

(3) The extent to which the applicant's completed project would affect the production of fish, shrimp, oysters, crabs or clams or any marine life or wildlife or other natural resources in a particular area including but not limited to water and oxygen supply.

(4) The extent to which the activity could cause erosion, shoaling of channels or creation of stagnant water.

(5) The extent to which the development could affect existing public access to tidal and

submerged lands, navigable waters and beaches or other recreational coastal resources.

(6) The extent to which the development could affect the habitats for rare and endangered species of wildlife or irreplaceable historic and archeological sites of South Carolina's coastal zone.

(7) The extent of the economic benefits as compared with the benefits from preservation of an area in its unaltered state.

(8) The extent of any adverse environmental impact which cannot be avoided by reasonable safeguards.

(9) The extent to which all feasible safeguards are taken to avoid adverse environmental impact resulting from a project.

(10) The extent to which the proposed use could affect the value and enjoyment of adjacent owners.

(B) After considering the views of interested agencies, local governments and persons, and after evaluation of biological and economic considerations, if the Council finds that the application is not contrary to the policies specified in this chapter, it shall issue to the applicant a permit. The permit may be conditioned upon the applicant's amending the proposal to take whatever measures the Council feels are necessary to protect the public interest. At the request of twenty citizens or residents of the county or counties affected, the Council shall hold a public hearing on any application which has an effect on a critical area, prior to issuing a permit. Such public hearings shall be open to all citizens of the State. When

applicable, joint public hearings will be held in conjunction with any such hearings required by the U.S. Army Corps of Engineers. On any permit application pertaining to a specific development which has been approved by the Council, the Council may support the applicant with respect to any federal permit applications pertaining to the same specific development.

(C) The Council shall act upon an application for a permit within ninety days after the application is filed. *Provided*, however, that in the case of minor developments, as defined in § 48-39-10, the Council shall have the authority to approve such permits and shall act within thirty days. In the event a permit is denied the Council shall state the reasons for such denial and such reasons must be in accordance with the provisions of this chapter.

(D) Any applicant having a permit denied or any person adversely affected by the granting of the permit has the right of direct appeal to the Council. Any applicant having a permit denied may challenge the validity of any or all reasons given for denial.

(E) Any permit may be revoked for noncompliance with or violation of its terms after written notice of intention to do so has been given the holder and the holder given an opportunity to present an explanation to the Council.

(F) Work authorized by permits issued hereunder shall be completed within three years after the date of issuance of the permit. The time limit may be extended for good cause showing that due diligence toward completion of the work has been made as evidenced by significant work progress.

HISTORY: 1977 Act No. 123 § 15, 1982 Act No. 410. § 2.

§ 48-39-160. Violations jurisdiction of courts.

The circuit court of the county in which the affected critical area or any part thereof lies shall have jurisdiction to restrain a violation of this chapter at the suit of the Council, the Attorney General or any person adversely affected in the event the affected critical area lies in more than one county, jurisdiction shall be in the circuit court of any county in which any part of the area lies. In the same action the circuit court having jurisdiction over the affected area may require such area to be restored to its original condition, if possible, and environmentally desirable. In the alternative, the Council may complete the restoration at the expense of the person altering the area in which case suit for recovery of the amount so expended may be brought in any court having jurisdiction to restrain a violation. No bond shall be required as a condition of the granting of a temporary restraining order under this section, except that the court may in its discretion require that a reasonable bond be posted by any person requesting the court to restrain a violation of this chapter.

HISTORY: 1977 Act No. 123 § 16.

§ 48-39-170. Penalties.

(A) Any person violating any provision of this chapter shall be deemed guilty of a misdemeanor and upon conviction shall be punished by imprisonment of nor more than six months or by a fine or not more than five thousand dollars, or both, for the first offense, and by imprisonment of not more than one year, or by a fine or

not more than ten thousand dollars, or both, for each subsequent offense.

(B) Any violation of any provision of this chapter involving five yards square (225 square feet) or less of critical area may be treated as a minor violation, the penalty for which shall be a fine of not less than fifty dollars nor more than two hundred dollars. The conservation officers of the South Carolina Wildlife and Marine Resources Department may serve warrants under this provision and otherwise enforce this chapter. The magistrates of this State have jurisdiction over minor violations of this chapter. Each day of noncompliance with any order issued relative to a minor violation or noncompliance with any permit, regulation, standard, or requirement relative to a minor violation shall constitute a separate offense; *provided*, however, that violations which involve the construction or repair of water control structures shall not be considered minor violations regardless of the area involved.

(C) Any person who is determined to be in violation of any provision of this chapter by the Coastal Council shall be liable for, and may be assessed by the Council for, a civil penalty of not less than one hundred dollars nor more than one thousand dollars per day of violation. Whenever the Council determines that any person is in violation of any permit, regulation, standard, or requirement under this chapter, the Council may issue an order requiring such person to comply with such permit, regulation, standard or requirement, including an order requiring restoration when deemed environmentally appropriate by the Council; in addition, the Council may bring a civil enforcement action under this section as well

as seeking an appropriate injunctive relief under § 48-39-160.

(D) All penalties assessed and collected pursuant to this section shall be deposited in the general fund of the State.

HISTORY: 1977 Act No. 123 § 17; 1982 Act No. 410, § 3.

§ 48-39-180. Judicial review of permit determinations.

Any applicant whose permit application has been denied, revoked, suspended or approved subject to conditions of the Council, or any person adversely affected by the permit, may, within twenty days after receiving notice thereof, file petition in the circuit court having jurisdiction over the affected land for a review of the Council's action "de novo" or to determine whether the Council's action so restricts or otherwise affects the use of the property as to deprive the owner of its existing practical use and is an unreasonable exercise of the State's police power because the action constitutes the equivalent of taking without compensation. If the court finds the action to be an unreasonable exercise of the police power it shall enter a finding that the action shall not apply to the land of the plaintiff, or in the alternative, that the Council shall pay reasonable compensation for the loss of use of the land. The use allowed by any permit issued under this chapter may, in the discretion of the court, be stayed pending decision on all appeals that may be taken. The circuit court may in its discretion require that a reasonable bond be posted by any person. It is specifically intended that any person whose permit application has been denied may have such permit issued by the

circuit court having jurisdiction if such person can prove the reasons given for denial to be invalid.

HISTORY: 1977 Act No. 123 § 18.

Cross references –

As to appeals to Circuit and County Courts in certain cases, see Chapter 7 of Title 18.

§ 48-39-190. Lands not affected by chapter.

Nothing in this chapter shall affect the status of the title of the State or any person to any land below the mean highwater mark. The State shall in no way be liable for any damages as a result of the erection of permitted works.

HISTORY: 1977 Act No. 123 § 19.

§ 48-39-200. Restrictions of Council's regulatory authority.

Notwithstanding any other provisions of this chapter, the Council shall have no direct regulatory authority over any area outside the critical areas in the coastal zone.

HISTORY: 1977 Act No. 123 § 20.

§ 48-39-210. Council only state agency authorized to permit or deny alterations or utilizations within critical areas.

Ninety days after July 1, 1977, the Council shall be the only state agency with authority to permit or deny any alteration or utilization within the critical area except

for the exemptions granted under § 48-39-130(D) and such application for a permit shall be acted upon within the time prescribed by this chapter.

HISTORY: 1977 Act No. 123 § 21.

§ 48-39-220. Legal action to determine interest in tidelands.

(A) Any person claiming an interest in tidelands which, for the purpose of this section, means all lands except beaches in the Coastal Zone between the mean high-water mark and the mean low-water mark of navigable waters without regard to the degree of salinity of such waters, may institute an action against the State of South Carolina for the purpose of determining the existence of any right, title or interest of such person in and to such tidelands as against the State. Service of process shall be made upon the secretary of the State Budget and Control Board.

(B) Any party may demand a trial by jury in any such action by serving upon the other party(s), a demand therefor in writing at any time after the commencement of the action and not later than ten (10) days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

(C) Nothing contained in this chapter shall be construed to change the law of this State as it exists on July 1, 1977, relative to the right, title, or interest in and to such tidelands, except as set forth in this action.

(D) The Attorney General shall immediately notify the Council upon receipt of any private suit made under

this section, his response to that suit, and the final disposition of the suit. The Council will publish all such notifications in the state register.

HISTORY: 1977 Act No. 123 § 22.

Cross references –

As to suits involving state, state agencies and officials and United States, see Chapter 77 of Title 15.

Research and Practice References –

Which way to the Beach? Public Access to Beaches for Recreational Use. 29 SC L Rev 627.

The South Carolina Coastal Zone Act of 1977. 29 SC L Rev 666.

CHAPTER 39

Coastal Tidelands and Wetlands

New Sections Added

SEC.

48-39-250. Legislative findings regarding the coastal beach/dune system.

48-39-260. Policy statement.

48-39-270. Definitions.

48-39-280. Forty-year retreat policy.

48-39-290. Restrictions on construction or reconstruction seaward of the baseline or between the baseline and the setback line; exceptions; special permits.

48-39-300. Local governments given authority to exempt certain erosion control structures from restrictions.

48-39-305. Judicial determination of ownership and whether construction prohibition applies or requires compensation; burden of proof.

48-39-310. Prohibition of destruction of any beach or dune vegetation seaward of setback line.

48-39-320. Comprehensive beach management plan.

48-39-330. Disclosure statement.

48-39-340. Distribution of funding.

48-39-350. Local comprehensive beach management plan.

48-39-355. Documentation of authorized activity.

48-39-360. Application of chapter.

§ 48-39-10. Definitions.

As used in this chapter:

[See parent volume for items (A)-(I)]

(J) "Critical area" means any of the following:

(1) coastal waters;

(2) tidelands;

(3) beaches;

(4) beach/dune system which is the area from the mean high-water mark to the setback line as determined in Section 48-39-280.

[See parent volume for remainder of text]

HISTORY: 1988 Act No. 634, § 4, eff July 1, 1988.

Effect of Amendment –

The 1988 amendment in item (J) rewrote subitem (4).

§ 48-39-30. Legislative declaration of state policy.

CASE NOTES

Evidence of purely economic benefit is insufficient as a matter of law to establish an overriding public interest necessary for certification of residential development and dredging. South Carolina Wildlife Federation v. South Carolina Coastal Council (1988) 296 SC 187, 371 SE2d 521.

§ 48-39-40. Creation of South Carolina Coastal Council; members; terms.

(A) There is created the South Carolina Coastal Council which consists of eighteen members as follows: eight members, one from each coastal zone county, to be elected by a majority vote of the members of the House of Representatives and a majority vote of the Senate members representing the county from three nominees submitted by the governing body of each coastal zone county, each House or Senate members to have one vote: six members, one from each of the congressional districts of the State, to be elected by a majority vote of the members of the House of Representatives and the Senate representing the counties in that district, each House or Senate member to have one vote; and the following legislative members who serve ex officio: two state senators, one to be appointed by the President of the Senate and one to be elected by the Senate Fish, Game and Forestry

Committee; and two members of the House of Representatives to be appointed by the Speaker of the House. The council shall elect a chairman, vice-chairman, and other officers it considers necessary.

(B) Terms of legislative members are coterminous with their terms as members of the General Assembly. Terms of all nonlegislative members are for four years and until successors are appointed and qualify. Members from congressional districts serve terms of two years only as determined by lot at the first meeting of the council. Vacancies must be filled in the original manner of selection for the remainder of the unexpired term.

HISTORY: 1990 Act No. 607, § 6, eff June 25, 1990.

Editor's Note –

Section 7 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"The current nonlegislative members of the South Carolina Coastal Council representing the eight coastal zone counties serve until their present terms of office expire at which time their successors elected in the manner provided in Section 48-39-40 of the 1976 Code, as amended by this act, take office."

Effect of Amendment –

The 1990 amendment, in subsection (A), provided for election of council members from coastal counties by members of the legislature from the county rather than by the county governing body; and in subsection (B), changed the term of non-legislative council members

from four to two years and deleted provisions governing the terms of members appointed when the council was initially formed.

CASE NOTES

Non-profit public interest organizations "devoted to the promotion of good government and the wise use and conservation of natural resources" whose members "use and enjoy the natural resources of the coastal zone of South Carolina which are affected by decisions of the South Carolina Coastal Council" did not have standing to challenge the constitutionality of § 48-39-40 insofar as it provides that 4 legislators serve ex officio on the 18-member South Carolina Coastal Council where the organizations alleged no individualized injury. Energy Research Foundation v. Waddell (1988) 295 SC 100, 367 SE2d 419.

§ 48-39-50. Powers and duties of Council.

Editor's Note –

Section 8 of 1990 Act No. 607, eff June 25, 1990 provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by

Act 634 of 1988, and in existence before the effective date of this act."

CASE NOTES

Coastal Council's grant of permit to landowner to impound 660 acres of marshland which would result in the blockage of navigable streams was reversed, since a principal purpose of the impoundment would not be to give effect to any overriding public interest, but, rather, to allow the permitted to engage in a commercial venture of building duck blinds for annual leasing. State ex rel. Medlock v South Carolina Coastal Council (1986) 289 SC 445, 346 SE2d 716.

The substantial evidence standard were for judicial review as stated in § 1-23-380 is a proper standard for review of actions by the Coastal Council and, the court will not substitute its judgment for that of the agency unless the agency's determination is affected by error of law or clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. State ex rel. Medlock v South Carolina Coastal Council (1986) 289 SC 445, 346 SE2d 716.

The Coastal Council does not have the authority to authorize the complete blockage of navigable streams and waterways, especially in the case where there is no overriding public interest. State ex rel. Medlock v South Carolina Coastal Council (1986) 289 SC 445, 346 SE2d 716.

ATTORNEY GENERAL'S OPINIONS

The Coastal Council is the sole state agency to issue permits for certain activities such as construction or

excavation in critical areas of this State's navigable, tidal waters. The Coastal Council would not have jurisdiction over permits previously issued by the Budget and Control Board which were in effect during the time when the Coastal Zone Management Act became effective. 1988 Op Atty Gen, No. 88-44, p. 133.

§ 48-39-70. Cooperation of other agencies and commissions; administration of oaths; subpoenas.

Editor's Note –

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Section 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

§ 48-39-80. Development of coastal management program.

Editor's Note –

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Section 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

CASE NOTES

Evidence of purely economic benefit is insufficient as a matter of law to establish an overriding public interest necessary for certification of residential development and dredging. South Carolina Wildlife Federation v South Carolina Coastal Council (1988) 296 SC 187, 371 SE2d 521.

Environmental groups and the league of women voters had standing to maintain an action to challenge a certification for a residential development involving dredging a channel through freshwater wetlands where the groups alleged an individualized injury in the adverse effect of a specific decision of the Coastal Council on their members' use and enjoyment of the fish and wildlife of the wetlands. South Carolina Wildlife Federation v South Carolina Coastal Council (1988) 296 SC 187, 371 SE2d 521.

§ 48-39-90. Public hearings on management plan.

Editor's Note –

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

§ 48-39-100. Plan developed in cooperation with local governments.

Editor's Note –

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Section 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this Act."

§ 48-39-110. Submission of plan by State Ports Authority.

Editor's Note –

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

§ 48-39-120. Development of beach erosion control policy; issuance of permits for erosion control structures; removal of structures; limitation on development of property.

Editor's Note –

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

Cross references –

The provisions of this section are not affected or modified by provisions concerning the damage, repair, or replacement of erosion control devices, see § 48-39-290.

§ 48-39-130. Permits required to utilize critical areas.

[See parent volume for subsections (A)-(C)]

(D) It shall not be necessary to apply for a permit for the following activities:

(1) The accomplishment of emergency orders of an appointed official of a county or municipality or of the State, acting to protect the public health and safety, upon notification to the council. However, with regard to the beach/dune critical area, only the use of sandbags, sandscraping, or renourishment, or a combination of them, in accordance with guidelines provided by the council is allowed pursuant to this item.

[See parent volume for items (2)-(5)]

(6) Emergency repairs to an existing bank, dike, fishing pier, or structure, other than oceanfront erosion control structures or devices, which has been erected in accordance with federal and state laws or provided for by general law or acts passed by the General Assembly, if notice is given in writing to the council within seventy-two hours from the onset of the needed repairs.

[See parent volume for remainder of text]

HISTORY: 1988 Act No. 634, § 5, eff July 1, 1988; 1990 Act No. 607, § 2, eff June 25, 1990.

Editor's Note –

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

Effect of Amendment –

The **1988** amendment in item (1) of subsection (D) added the last sentence relating to sandbags and sandscraping, and in item (6) of subsection (D) deleted a reference to fishing piers.

The **1990** amendment revised subsection (D), items (1) and (6) by adding renourishment as an option in item (1), and adding a reference to structures other than oceanfront erosion control structures or devices in item (6).

CASE NOTES

Coastal Council's grant of permit to landowner to impound 660 acres of marshland which would result in the blockage of navigable streams was reversed, since a principal purpose of the impoundment would not be to give effect to any overriding public interest, but, rather, to allow the permittee to engage in a commercial venture

of building duck blinds for annual leasing. State ex rel. Medlock v. South Carolina Coastal Council (1986) 289 SC 445, 346 SE2d 716.

§ 48-39-140. Submission of development plans; application for permits.

Editor's Note –

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

§ 48-39-150. Approval or denial of permits; appeal to Council.

Editor's Note –

Section 8 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this

act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

Cross references –

Appeal of denial of special permit to build or rebuild a structure other than an erosion control structure seaward of the baseline is to be made pursuant to procedures in this section, see § 48-39-290.

§ 48-39-160. Violations; jurisdiction of courts.

Editor's Note –

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

§ 48-39-170. Penalties.

Editor's Note –

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

§ 48-39-180. Judicial review of permit determinations.

Editor's Note –

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

§ 48-39-190. Lands not affected by chapter.

Editor's Note –

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

§ 48-39-200. Restriction of Council's regulatory authority.

Editor's Note –

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

§ 48-39-210. Council only state agency authorized to permit or deny alterations or utilizations within critical areas.

Editor's Note –

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

§ 48-39-220. Legal action to determine interest in tidelands.

Editor's Note –

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

§ 48-39-250. Legislative findings regarding the coastal beach/dune system.

The General Assembly finds that:

(1) The beach/dune system along the coast of South Carolina is extremely important to

the people of this State and serves the following functions:

(a) protects life and property by serving as a storm barrier which dissipates wave energy and contributes to shoreline stability in an economical and effective manner;

(b) provides the basis for a tourism industry that generates approximately two-thirds of South Carolina's annual tourism industry revenue which constitutes a significant portion of the state's economy. The tourists who come to the South Carolina coast to enjoy the ocean and dry sand beach contribute significantly to state and local tax revenues;

(c) provides habitat for numerous species of plants and animals, several of which are threatened or endangered. Waters adjacent to the beach/dune system also provide habitat for many other marine-species;

(d) provides a natural healthy environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well-being.

(2) Beach/dune system vegetation is unique and extremely important to the vitality and preservation of the system.

(3) Many miles of South Carolina's beaches have been identified as critically eroding.

(4) Chapter 39 of title 48, Coastal Tidelands and Wetlands, prior to 1988, did not provide adequate jurisdiction to the South Carolina Coastal Council to enable it to effectively protect the integrity of the beach/dune system.

Consequently, without adequate controls, development unwisely has been sited too close to the system. This type of development has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property. It is in both the public and private interests to protect the system from this unwise development.

(5) The use of armoring in the form of hard erosion control devices such as seawalls, bulkheads, and rip-rap to protect erosion-threatened structures adjacent to the beach has not proven effective. These armoring devices have given a false sense of security to beachfront property owners. In reality, these hard structures, in many instances, have increased the vulnerability of beachfront property to damage from wind and waves while contributing to the deterioration and loss of the dry sand beach which is so important to the tourism industry.

(6) Erosion is a natural process which becomes a significant problem for man only when structures are erected in close proximity to the beach/dune system. It is in both the public and private interests to afford the beach/dune system space to accrete and erode in its natural cycle. This

space can be provided only by discouraging new construction in close proximity to the beach/dune system and encouraging those who have erected structures too close to the system to retreat from it.

(7) Inlet and harbor management practices, including the construction of jetties which have not been designed to accommodate the longshore transport of sand, may deprive downdrift beach/dune systems of their natural sand supply. Dredging practices which include disposal of beach quality sand at sea also may deprive the beach/dune system of much-needed sand.

(8) It is in the state's best interest to protect and to promote increased public access to South Carolina's beaches for out-of-state tourists and South Carolina residents alike.

(9) Present funding for the protection, management, and enhancement of the beach/dune system is inadequate.

(10) There is no coordinated state policy for post-storm emergency management of the beach/dune system.

(11) A long-range comprehensive beach Management plan is needed for the entire coast of South Carolina to protect and manage effectively the beach/dune system, thus preventing unwise development and minimizing man's adverse impact on the system.

HISTORY: 1990 Act No. 607, § 1, eff June 25, 1990.

Editor's Note –

Section 5 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"The General Assembly hereby recognizes the need for maintaining navigation inlets to promote commercial and recreational uses of our coastal waters and their resources. The General Assembly further recognizes that inlets alter the natural drift of beach-quality sand resources, which often results in these sand resources being deposited around shallow outer-bar areas instead of providing natural nourishment to the downdrift beaches. Therefore, it is the intent of the General Assembly that:

(1) All construction and maintenance dredgings of beach-quality sand be placed on the downdrift beaches or, if placed elsewhere, an equivalent quality and quantity of sand from an alternate location be placed on the downdrift beaches at no cost to the State and at a location acceptable to the South Carolina Coastal council.

(2) On an average annual basis, a quantity of sand be placed on the downdrift beaches equal to the natural net annual longshore sediment transport at no cost to the State. The placement location and quantities based on natural net annual longshore transport be established by the council and the sand quality be acceptable to the council.

(3) The council may promulgate regulations necessary to implement the provisions of this section."

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

§ 48-39-260. Policy statement.

In recognition of its stewardship responsibilities, the policy of South Carolina is to:

(1) protect, preserve, restore, and enhance the beach/dune system, the highest and best uses of which are declared to provide:

(a) protection of life and property by acting as a buffer from high tides, storm surge, hurricanes, and normal erosion;

(b) a source for the preservation of dry sand beaches which provide recreation and a major source of state and local business revenue;

(c) an environment which harbors natural beauty and enhances the well-being of the citizens of this State and its visitors;

(d) natural habitat for indigenous flora and fauna including endangered species;

(2) create a comprehensive, long-range beach management plan and require local comprehensive beach management plans for the protection, preservation, restoration, and enhancement of the beach/dune system. These plans must promote wise use of the state's beachfront to include a gradual retreat from the system over a forty-year period;

(3) severely restrict the use of hard erosion control devices to armor the beach/dune system and to encourage the replacement of hard erosion control devices with soft technologies as approved by the South Carolina Coastal Council which will provide for the protection of the shoreline without long-term adverse effects;

(4) encourage the use of erosion-inhibiting techniques which do not adversely impact the long-term well-being of the beach/dune system;

(5) promote carefully planned nourishment as a means of beach preservation and restoration where economically feasible;

(6) preserve existing public access and promote the enhancement of public access to assure full enjoyment of the beach by all our citizens including the handicapped and encourage the purchase of lands adjacent to the Atlantic Ocean to enhance public access;

(7) involve local governments in long-range comprehensive planning and management of the beach/dune system in which they have a vested interest;

(8) establish procedures and guidelines for the emergency management of the beach/dune system following a significant storm event.

HISTORY: 1990 Act No. 607, § 1, eff June 25, 1990.

Editor's Note –

Section 5 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"The General Assembly hereby recognizes the need for maintaining navigation inlets to promote commercial and recreational uses of our coastal waters and their resources. The General Assembly further recognizes that inlets alter the natural drift of beach-quality sand resources, which often results in these sand resources being deposited around shallow outer-bar areas instead of providing natural nourishment to the downdrift beaches. Therefore, it is the intent of the General Assembly that:

(1) All construction and maintenance dredgings of beach-quality sand be placed on the downdrift beaches or, if placed elsewhere, an equivalent quality and quantity of sand from an alternate location be placed on the downdrift beaches at no cost to the State and at a location acceptable to the South Carolina Coastal Council.

(2) On an average annual basis, a quantity of sand be placed on the downdrift beaches

equal to the natural net annual longshore sediment transport at no cost to the State. The placement location and quantities based on natural net annual longshore transport be established by the council and the sand quality be acceptable to the council.

(3) The council may promulgate regulations necessary to implement the provisions of this section."

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

§ 48-39-270. Definitions.

As used in this chapter:

(1) Erosion control structures or devices include:

(a) seawall: a special type of retaining wall that is designed specifically to withstand normal wave forces;

(b) bulkhead: a retaining wall designed to retain fill material but not to withstand wave forces on an exposed shoreline;

(c) revetment: a sloping structure built along an escarpment or in front of a bulkhead to protect the shoreline or bulkhead from erosion.

(2) Habitable structure means a structure suitable for human habitation including, but not limited to, single or multifamily residences, hotels, condominium buildings, and buildings for commercial purposes. Each building of a condominium regime is considered a separate habitable structure but, if a building is divided into apartments, then the entire building, not the individual apartment, is considered a single habitable structure. Additionally, a habitable structure includes porches, gazebos, and other attached improvements.

(3) Council means the South Carolina Coastal Council.

(4) Beach nourishment means the artificial establishment and periodic renourishment of a beach with sand that is compatible with the existing beach in a way so as to create a dry sand beach at all stages of the tide.

(5) The beach/dune system includes all land from the mean highwater mark of the Atlantic Ocean landward to the setback line described in Section 48-39-280.

(6) A standard erosion zone is a segment of shoreline which is subject to essentially the same set of coastal processes, has a fairly constant range of profiles and sediment characteristics, and is not influenced

directly by tidal inlets or associated inlet shoals.

(7) An inlet erosion zone is a segment of shoreline along or adjacent to tidal inlets which is influenced directly by the inlet and its associated shoals.

(8) Master plan means a document or a map prepared by a developer or a city as a policy guide to decisions about the physical development of the project or community.

(9) Planned development means a development-plan which has received local approval for a specified number of dwelling and other units. The siting and size of structures and amenities are specified or restricted within the approval. This term specifically references multifamily or commercial projects not otherwise referenced by the terms, master plan, or planned unit development.

(10) Planned unit development means a residential, commercial, or industrial development, or all three, designed as a unit and approved by local government.

(11) Destroyed beyond repair means that more than sixty-six and two-thirds percent of the replacement value of the habitable structure or pool has been destroyed. If the owner disagrees with the appraisal of the council, he may obtain an appraisal to evaluate the damage to the building or pool. If the appraisals differ, then the two appraisers must select a third appraiser. If the two appraisers are unable to select a

third appraiser, the clerk of court of the county where the structure lies must make the selection. Nothing in this section prevents a court of competent jurisdiction from reviewing, de novo, the appraisal upon the petition of the property owner.

(12) Pool is a structure designed and used for swimming and wading.

(13) Active beach is that area seaward of the escarpment or the first line of stable natural vegetation, which ever first occurs, measured from the ocean.

HISTORY: 1988 Act No. 634, § 3, eff July 1, 1988; 1990 Act No. 607, § 3, eff June 25, 1990.

Editor's Note –

Sections 1 and 2 of Act 634 of 1988 are repealed pursuant to 1990 Act No. 607, § 4, eff June 25, 1990.

Section 5 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"The General Assembly hereby recognizes the need for maintaining navigation inlets to promote commercial and recreational uses of our coastal waters and their resources. The General Assembly further recognizes that inlets alter the natural drift of beach-quality sand resources, which often results in these sand resources being deposited around shallow outer-bar areas instead of providing natural nourishment to the downdrift beaches. Therefore, it is the intent of the General Assembly that:

(1) All construction and maintenance dredgings of beach-quality sand be placed on

the downdrift beaches or, if placed elsewhere, an equivalent quality and quantity of sand from an alternate location be placed on the downdrift beaches at no cost to the State and at a location acceptable to the South Carolina Coastal council.

(2) On an average annual basis, a quantity of sand be placed on the downdrift beaches equal to the natural net annual longshore sediment transport at no cost to the State. The placement location and quantities based on natural net annual longshore transport be established by the council and the sand quality be acceptable to the council.

(3) The council may promulgate regulations necessary to implement the provisions of this section."

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

Effect of Amendment –

The 1990 amendment rewrote this section.

§ 48-39-280. Forty-year retreat policy.

(A) A forty-year policy of retreat from the shoreline is established. The council must implement this policy and must utilize the best available scientific and historical data in the implementation. The council must establish a baseline which parallels the shoreline for each standard erosion zone and each inlet erosion zone.

(1) The baseline for each standard erosion zone is established at the location of the crest of the primary oceanfront sand dune in that zone. In standard erosion zones in which the shoreline has been altered naturally or artificially by the construction of erosion control devices, groins, or other manmade alterations, the baseline must be established by the council using the best scientific and historical data, as where the crest of the primary oceanfront sand dunes for that zone would be located if the shoreline had not been altered.

(2) The baseline for inlet erosion zones that are not stabilized by jetties, terminal groins, or other structures must be determined by the council as the most landward point of erosion at any time during the past forty years, unless the best available scientific and historical data of the inlet and adjacent beaches indicate that the shoreline is unlikely to return to its former position. In collecting and utilizing the best scientific and historical data available for the implementation of the retreat policy, the council, as part of the State Comprehensive Beach Management Plan provided for in this chapter, among other factors must consider

historical inlet migration, inlet stability,channel and ebb tidal delta changes, the effects of sediment bypassing on shorelines adjacent to the inlets, and the effects of nearby beach restoration projects on inlet sediment budgets.

(3) The baseline within inlet erosion zones that are stabilized by jetties, terminal groins, or other structures must be determined in the same manner as provided for in item (1). However, the actual location of the crest of the primary oceanfront sand dunes of that erosion zone is the baseline of that zone, not the location if the inlet had remained unstabilized.

(4) Notwithstanding any other provision of this section, where a council-approved beach nourishment project has been completed, the local government or the landowners, with notice to the local government, may petition the council to move the baseline as far seaward as the landward edge of the erosion control structure or device or, if there is no existing erosion control structure or device, then as far seaward as the post project baseline as determined by the council in accordance with Section 48-39-280(A)(1) by showing that the beach has been stabilized by council-approved beach nourishment.

If the petitioner is asking that the baseline be moved seaward pursuant to this section, he must show an ongoing commitment to renourishment which will stabilize and maintain the dry sand beach at all stages of the tide for the foreseeable future.

If the council grants the petition to move the baseline seaward pursuant to this section, no new construction may occur in the area between the former baseline and the new baseline for three years after the initial beach nourishment project has been completed as determined by the council.

If the beach nourishment fails to stabilize the beach after a reasonable period of time, the council must move the baseline landward to the primary oceanfront sand dune as determined pursuant to items (1), (2), and (3) for that section of the beach.

(B) To implement the retreat policy provided for in subsection (A), a setback line must be established landward of the baseline a distance which is forty times the average annual erosion rate or not less than twenty feet from the baseline for each erosion zone based upon the best historical and scientific data adopted by the council as a part of the State Comprehensive Beach Management Plan.

(C) The council, before July 3, 1991, must establish a final baseline and setback line for each erosion zone based on the best available scientific and historical data as provided in subsection (B) and with consideration of public input. The baseline and setback line must not be revised before July 1, 1988, nor later than July 1, 2000. After that revision, the baseline and setback line must be revised not less than every eight years but not more than every ten years after each preceding revision. In the establishment and revision of the baseline and setback line, the council must transmit and otherwise make readily available to the public all information upon which

its decisions are based for the establishment of the final baseline and setback line. The council must hold one public hearing before establishing the final baseline and setback lines. Until the council establishes new baselines and setback lines, the existing baselines and setback lines must be used. The council may stagger the revision of the baselines and setback lines of the erosion zones so long as every zone is revised in accordance with the time guidelines established in this section.

(D) In order to locate the baseline and the setback line, the council must establish monumented and controlled survey points in each county fronting the Atlantic Ocean. The council must acquire sufficient surveyed topographical information on which to locate the baseline. Surveyed topographical data typically must be gathered at two thousand foot intervals. However, in areas subject to significant near-term development and in areas currently developed, the interval, at the discretion of the council, may be more frequent. The resulting surveys must locate the crest of the primary oceanfront sand dunes to be used as the baseline for computing the forty-year erosion rate. In cases where no primary oceanfront sand dunes exist, a study conducted by the council is required to determine where the upland location of the crest of the primary oceanfront sand dune would be located if the shoreline had not been altered. The council, by regulation, may exempt specifically described portions of the coastline from the survey requirements of this section when, in its judgment, the portions of coastline are not subject to erosion or are not likely to be developed by virtue of local, state, or federal programs in effect on

the coastline which would preclude significant development, or both.

(E) A landowner claiming ownership of property affected who feels that the final or revised setback line, baseline, or erosion rate as adopted is in error, upon submittal of substantiating evidence, must be granted a review of the setback line, baseline, or erosion rate, or a review of all three. The requests must be forwarded to the appropriate committee of the council and handled in accordance with the council's regulations on appeals.

HISTORY: 1988 Act No. 634, § 3, eff July 1, 1988; 1990 Act No. 607, § 3, eff June 25, 1990.

Editor's Note –

Section 5 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"The General Assembly hereby recognizes the need for maintaining navigation inlets to promote commercial and recreational uses of our coastal waters and their resources. The General Assembly further recognizes that inlets alter the natural drift of beach-quality sand resources, which often results in these sand resources being deposited around shallow outer-bar areas instead of providing natural nourishment to the downdrift beaches. Therefore, it is the intent of the General Assembly that:

(1) All construction and maintenance dredgings of beach-quality sand be placed on the downdrift beaches or, if placed elsewhere, an equivalent quality and quantity of sand from an alternate location be placed on the downdrift beaches at no cost to the State and at a location

acceptable to the South Carolina Coastal council.

(2) On an average annual basis, a quantity of sand be placed on the downdrift beaches equal to the natural net annual longshore sediment transport at no cost to the State. The placement location and quantities based on natural net annual longshore transport be established by the council and the sand quality be acceptable to the council.

(3) The council may promulgate regulations necessary to implement the provisions of this section."

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

Effect of Amendment –

The **1990** amendment rewrote this section.

Cross references –

As to definitions, see § 48-39-270.

As to the definition of "critical area", see § 48-39-280(j).

§ 48-39-290. Restrictions on construction or reconstruction seaward of the baseline or between the baseline and the setback line; exceptions; special permits.

(A) No new construction or reconstruction is allowed seaward of the baseline except:

(1) wooden walkways no larger in width than six feet;

(2) small wooden decks no larger than one hundred forty-four square feet;

(3) fishing piers which are open to the public. Those fishing piers with their associated structures including, but not limited to, baitshops, restrooms, restaurants, and arcades which existed September 21, 1989, may be rebuilt if they are constructed to the same dimensions and utilized for the same purposes and remain open to the public. In addition, those fishing piers with their associated structures which existed on September 21, 1989, that were privately owned, privately maintained, and not open to the public on this date also may be rebuilt and used for the same purposes if they are constructed to the same dimensions;

(4) gold courses;

(5) normal landscaping;

(6) structures specifically permitted by special permit as provided in subsection (D);

(7) pools may be reconstructed if they are landward of an existing, functional erosion control structure or device.

A permit must be obtained from the council for items (2) through (7).

(B) construction, reconstruction, or alterations between the baseline and the setback line are governed as follows:

(1) Habitable structures:

(a) New habitable structures: If part of a new habitable structure is constructed seaward of the setback line, the owner must certify in writing to the council that the construction meets the following requirements:

(i) the habitable structure is no larger than five thousand square feet of heated space. The structure must be located as far landward on the property as practicable. A drawing must be submitted to the council showing a footprint of the structure on the property, a cross section of the structure, and the structure's relation to property lines and setback lines which may be in effect. No erosion control structure or device may be incorporated as an integral part of a habitable structure constructed pursuant to this section.

(ii) No part of the building is being constructed on the primary oceanfront sand dune or seaward of the baseline.

(b) Habitable structures which existed on the effective date of Act 634 of 1988 or constructed pursuant to this section:

(i) Normal maintenance and repair of habitable structures is allowed without notice to the council.

(ii) Additions to habitable structures are allowed if the additions together with the existing structure do not exceed five thousand square feet of heated space. Additions to habitable structures must comply with the conditions of new habitable structures as set forth in subitem (a).

(iii) Repair or renovation of habitable structures damaged, but not destroyed beyond repair, due to natural or manmade causes is allowed.

(iv) Replacement of habitable structures destroyed beyond repair due to natural causes is allowed after notification is provided by the owner to the council that all of the following requirements are met:

a. The total square footage of the replaced structure seaward of the setback line does not exceed the total square footage of the original structure seaward of the setback line. The linear footage of

the replaced structure parallel to the coast does not exceed the original linear footage parallel to the coast.

b. the replaced structure is no farther seaward than the original structure.

c. Where possible, the replaced structure is moved landward of the setback line or, if not possible, then as far landward as is practicable, considering local zoning and parking regulations.

d. the reconstruction is not seaward of the baseline unless permitted elsewhere in Sections 48-39-250 through 48-39-360.

(v) Replacement of habitable structures destroyed beyond repair due to manmade causes is allowed provided the rebuilt structure is no larger than the original structure it replaces and is constructed as far landward as possible, but the new structure must not be farther seaward than the original structure.

(2) Erosion control devices:

(a) No new erosion control structures or devices are allowed seaward of the setback line except to protect a public highway which existed on the effective date of this act.

(b) Erosion control structures or devices which existed on the effective date of this act must not be required or replaced if destroyed:

(i) more than eighty percent above grade through June 30, 1995;

(ii) more than sixty-six and two-thirds percent above grade from July 1, 1995, through June 30, 2005;

(iii) More than fifty percent above grade after June 30, 2005.

(iv) Damage to seawalls and bulkheads must be judged on the percent of the structure remaining intact at the time of damage assessment. The portion of the structure or device above grade parallel to the shoreline must be evaluated. The length of the structure or device parallel to the shoreline still intact must be compared to the length of the structure or device parallel to the shoreline which has been destroyed. The length of the structure or device parallel to the shoreline determined to be destroyed divided by the total length of the original structure or device parallel to the shoreline yields the percent destroyed. Those portions of the structure or device standing, cracked or broken piles, whalers, and panels must be assessed on

an individual basis to ascertain if these components are repairable or if replacement is required. Revetments must be judged on the extent of displacement of stone, effort required to return these stones to the prestorm event configuration of the structure or device, and ability of the revetment to retain backfill material at the time of damage assessment. If the property owner disagrees with the assessment of a registered professional engineer acting on behalf of the council, he may obtain an assessment by a registered professional engineer to evaluate, as set forth in this item, the damage to the structure or device. If the two assessments differ, then the two engineers who performed the assessments must select a registered professional engineer to perform the third assessment. If the first two engineers are unable to select an engineer to perform the third assessment, the clerk of court of the county where the structure or device lies must make the selection of a registered professional engineer. The determination of percentage of damage by the third engineer is conclusive.

(v) The determination of the degree of destruction must be made on

a lot by lot basis by reference to county tax maps.

(vi) Erosion control structures or devices must not be enlarged, strengthened, or rebuilt but may be maintained in their present condition if not destroyed more than the percentage allowed in Section 48-39-290(B)(2)(b)(i), (ii), and (iii). Repairs must be made with materials similar to those of the structure or device being repaired.

(c) Erosion control structures or devices determined to be destroyed more than the percentage allowed in Section 48-39-290(B)(2)(b)(i), (ii), and (iii) must be removed at the owner's expense. Nothing in this section requires the removal of an erosion control structure or a device protecting a public highway which existed on the effective date of Act 634 of 1988.

(d) the provisions of this section do not affect or modify the provisions of Section 48-39-120(C).

(3) Pools, as defined in Section 48-39-270(12):

(a) No new pools may be constructed seaward of the setback line unless the pool is build landward of an erosion control structure or device which was in existence or permitted on the effective date of this act and is built as far landward as practical.

(b) Normal maintenance and repair is allowed without notice to the council.

(c) If a pool, existing on July 1, 1988, is destroyed beyond repair, as determined by the council pursuant to Section 48-39-270(11), it may be replaced if the owner certifies in writing to the council that:

(i) It is moved as far landward as practical. This determination of practicality must include the consideration of local zoning requirements.

(ii) It is rebuilt no larger than the destroyed pool.

(iii) It is constructed according to acceptable standards of pool construction and cannot be reinforced in a manner so as to act as an erosion control structure or device.

(d) If a pool is not destroyed beyond repair as determined by the council pursuant to Section 48-39-270(11) but the owner wishes to replace it, the owner may do so if:

(i) The dimensions of the pool are not enlarged.

(ii) The construction conforms to sub-subitem (iii) to subitem (c).

(4) All other construction or alteration between the baseline and the setback line requires a council permit. However, the council, in its

discretion, may issue general permits for construction or alterations where issuance of the general permits would advance the implementation and accomplishment of the goals and purposes of sections 48-39-250 through 48-39-360.

(C)(1) Notwithstanding the provisions relating to new construction, a person, partnership, or corporation owning real property that is affected by the setback line as established in Section 48-39-280 may proceed with construction pursuant to a valid building permit issued as of the effective date of this section. The person, partnership, or corporation may proceed with the construction of buildings and other elements of a master plan, planned development, or planned unit development notwithstanding the setback line established in this chapter if the person, partnership, or corporation legally has begun a use as evidence by at least one of the following:

(a) All building permits have been applied for or issued by a local government before July 1, 1988.

(b) There is a master plan, planned development, or planned unit development:

(i) that has been approved in writing by a local government before July 1, 1988; or

(ii) where work has begun pursuant to approval as evidenced by the completion of the utility and infrastructure installation designed to service the real property that is subject to the

setback line and included in the approved master plan, planned development, or planned unit development.

(2) However, repairs performed on a habitable structure built pursuant to this section are subject to the guidelines for repairs as set forth in this section.

(3) Nothing in this section prohibits the construction of fishing piers or structures which enhance beach access seaward of the baseline, if permitted by the council.

(D) Special permits:

(1) If an applicant requests a permit to build or rebuild a structure other than an erosion control structure or device seaward of the baseline that is not allowed otherwise pursuant to Sections 48-39-250 through 48-39-360, the council may issue a special permit to the applicant authorizing the construction or reconstruction if the structure is not constructed or reconstructed on a primary oceanfront sand dune or on the active beach and, if the beach erodes to the extent the permitted structure becomes situated on the active beach, the permittee agrees to remove the structure from the active beach if the council orders the removal. However, the use of the property authorized under this provision, in the determination of the council, must not be detrimental to the public health, safety, or welfare.

(2) The council's Permitting Committee is the committee to consider applications for special permits.

(3) In granting a special permit, the committee may impose reasonable additional conditions and safeguards as, in its judgment, will fulfill the purposes of Sections 48-39-250 through 48-39-360.

(4) A party aggrieved by the committee's decision to grant or deny a special permit application may appeal to the full council pursuant to Section 48-39-150(D).

(E) The provisions of this section and Section 48-39-280 do not apply to an area in which the erosion of the beaches located in its jurisdiction is attributed to a federally authorized navigation project as documented by the findings of a Section 111 Study conducted under the authority of the federal Rivers and Harbors Act of 1968, as amended by the federal Water Resources Development Act of 1986, and approved by the United States Army Corps of Engineers. Nothing contained in this subsection makes this area ineligible for beach renourishment funds.

The baseline determined by the local governing body and the council is the line of erosion control devices and structures and the council retains its jurisdiction seaward of the baseline. In addition, upon completion of a council approved beach renourishment project, including the completion of a sand transfer system if necessary for long-term stabilization, an area under a Section 111 Study becomes subject to all the provisions of this chapter.

For the purposes of this section, a beach nourishment project stabilizing the beach exists if a successful restoration project is completed consisting of at least one hundred fifty cubic yards a foot over a length of five and one-half miles, with a project design capable of withstanding a one-in-ten-year storm, as determined by council, and renourishment is conducted annually at a rate, agreed upon by the council and local governing body, equivalent to that which would occur naturally if the navigation project causing the erosion did not exist. If the two parties cannot agree, then the council must obtain the opinion of an independent third party.

Any habitable structure located in an area in which the erosion of the beaches located in its jurisdiction is attributed to a federally authorized navigation project as documented by the findings of a Section 111 Study, which was in existence on September 21, 1989, and was over forty years old on that date and is designated by the local governing body as an historical landmark may be rebuilt seaward of the baseline if it is rebuilt to the exact specifications, dimensions, and exterior appearance of the structure as it existed on that date.

HISTORY: 1988 Act No. 634, § 1, eff July 1, 1988; 1990 Act No. 607, § 3, eff June 25, 1990.

Editor's Note –

Section 5 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"The General Assembly hereby recognizes the need for maintaining navigation inlets to promote commercial and recreational uses of our coastal waters and their

resources. The General Assembly further recognizes that inlets alter the natural drift of beach-quality sand resources, which often results in these sand resources being deposited around shallow outer-bar areas instead of providing natural nourishment to the downdrift beaches. Therefore, it is the intent of the General Assembly that:

(1) All construction and maintenance dredgings of beach-quality sand be placed on the downdrift beaches or, if placed elsewhere, an equivalent quality and quantity of sand from an alternate location be placed on the downdrift beaches at no cost to the State and at a location acceptable to the South Carolina Coastal Council.

(2) On an average annual basis, a quantity of sand be placed on the downdrift beaches equal to the natural net annual longshore sediment transport at no cost to the State. The placement location and quantities based on natural net annual longshore transport be established by the council and the sand quality be acceptable to the council.

(3) The council may promulgate regulations necessary to implement the provisions of this section."

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this

act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

Effect of Amendment –

The **1990** amendment rewrote this section.

§ 48-39-300. Local governments given authority to exempt certain erosion control structures from restrictions.

A local governing body, if it notifies the council before July 1, 1990, may exempt from the provisions of Section 48-39-290, relating to reconstruction and removal of erosion control devices, the shorelines fronting the Atlantic Ocean under its jurisdiction where coastal erosion has been shown to be attributed to a federally authorized navigation project as documented by the findings of a Section 111 Study conducted under the authority of the Rivers and Harbors Act of 1968, as amended by the Water Resources Development Act of 1986 and approved by the United States Army Corps of Engineers. Erosion control devices exempt under this section must not be constructed seaward of their existing location, increased in dimension, or rebuilt out of materials different from that of the original structure.

HISTORY: 1988 Act No. 634, § 3, eff July 1, 1988; 1990 Act No. 607, § 3, eff June 25, 1990.

Editor's Note –

Section 5 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"The General Assembly hereby recognizes the need for maintaining navigation inlets to promote commercial and recreational uses of our coastal waters and their resources. The General Assembly further recognizes that inlets alter the natural drift of beach-quality sand resources, which often results in these sand resources being deposited around shallow outer-bar areas instead of providing natural nourishment to the downdrift beaches. Therefore, it is the intent of the General Assembly that:

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"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Section 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

Effect of Amendment –

The 1990 amendment rewrote this section.

§ 48-39-305. Judicial determination of ownership and whether construction prohibition applies or requires compensation; burden of proof.

(A) A person having a recorded interest or interest by operation of law in or having registered claim to land seaward of the baseline or setback line which is affected by the prohibition of construction or reconstruction may petition the circuit court to determine whether the petitioner is the owner of the land or has an interest in it. If he is adjudged the owner of the land or to have an interest in it, the court shall determine whether the prohibition so restricts the use of the property as to deprive the owner of the practical uses of it and is an unreasonable exercise of police power and constitutes a taking without compensation. The burden of proof is on the petitioner as

to ownership, and the burden of proof is on the State to prove that the prohibition is not an unreasonable exercise of police power.

(B) The method provided in this section for the determination of the issue of whether the prohibition of the issue, and it must not be determined in another judicial proceeding. The court shall enter a judgment in accordance with the issues. If the judgment is in favor of the petitioner, the order must require the State either to issue the necessary permits for construction or reconstruction of a structure, order that the prohibition does not apply to the property, or provide reasonable compensation for the loss of the use of the land or the payment of costs and reasonable attorney's fees, or both. Either party may appeal the court's decision.

HISTORY: 1990 Act No. 607, § 3, eff June 25, 1990.

Editor's Note –

Section 5 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"The General Assembly hereby recognizes the need for maintaining navigation inlets to promote commercial and recreational uses of our coastal waters and their resources. The General Assembly further recognizes that inlets alter the natural drift of beach-quality sand resources, which often results in these sand resources being deposited around shallow outer-bar areas instead of providing natural nourishment to the downdrift beaches. Therefore, it is the intent of the General Assembly that:

(1) All construction and maintenance dredgings of beach-quality sand be placed on the downdrift beaches or, if placed elsewhere, and equivalent quality and quantity of sand from an alternate location be placed on the downdrift beaches at no cost to the State and at a location acceptable to the South Carolina Coastal Council.

(2) On an average annual basis, a quantity of sand be placed on the downdrift beaches equal to the natural net annual longshore sediment transport at no cost to the State. The placement location and quantities based on natural net annual longshore transport be established by the council and the sand quality be acceptable to the council.

(3) The council may promulgate regulations necessary to implement the provisions of this section."

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Section 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

§ 48-39-310. Prohibition of destruction of any beach or dune vegetation seaward of setback line.

The destruction of beach or dune vegetation seaward of the setback line is prohibited unless there is no feasible

alternative. When there is destruction of vegetation permitted seaward of the setback line, mitigation, in the form of planting of new vegetation where possible, for the destruction is required as part of the permit conditions.

HISTORY: 1988 Act No. 634, § 3, eff July 1, 1988; 1990 Act No. 607, § 3, eff June 25, 1990.

Editor's Note –

Section 5 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"The General Assembly hereby recognizes the need for maintaining navigation inlets to promote commercial and recreational uses of our coastal waters and their resources. The General Assembly further recognizes that inlets alter the natural drift of beach-quality sand resources, which often results in these sand resources being deposited around shallow outer-bar-areas instead of providing natural nourishment to the downdrift beaches. Therefore, it is the intent of the General Assembly that:

(1) All construction and maintenance dredgings of beach-quality sand be placed on the downdrift beaches or, if placed elsewhere, and equivalent quality and quantity of sand from an alternate location be placed on the downdrift beaches at no cost to the State and at a location acceptable to the South Carolina Coastal Council.

(2) On an average annual basis, a quantity of sand be placed on the downdrift beaches

equal to the natural net annual longshore sediment transport at no cost to the State. The placement location and quantities based on natural net annual longshore transport be established by the council and the sand quality be acceptable to the council.

(3) The council may promulgate regulations necessary to implement the provisions of this section."

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

Effect of Amendment –

The 1990 amendment rewrote this section.

§ 48-39-320. Comprehensive beach management plan.

(A) The council's responsibilities include the recreation of long-range and comprehensive beach management plan for the Atlantic Ocean shoreline in South Carolina. The plan must include all of the following:

(1) development of the data base for the state's coastal areas to provide essential information necessary to make informed and scientifically based decisions concerning the

maintenance or enhancement of the beach/dune system;

(2) development of guidelines and their coordination with appropriate agencies and local governments for the accomplishment of:

(a) beach/dune restoration and nourishment, including the projected impact on coastal erosion rates, cost/benefit of the project, impact on flora and fauna, and funding alternatives;

(b) development of a beach access program to preserve the existing public access and enhance public access to assure full enjoyment of the beach by all residents of this State;

(c) maintenance of a dry sand and ecologically stable beach;

(d) protection of all sand dunes seaward of the setback line;

(e) protection of endangered species, threatened species, and important habitats such as nesting grounds;

(f) regulation of vehicular traffic upon the beaches and the beach/dune system which includes the prohibition of vehicles upon public beaches for nonessential uses;

(g) development of a mitigation policy for construction allowed seaward of the setback line, which must include public access ways, nourishment, vegetation, and other appropriate means;

(3) formulation of recommendations for funding programs which may achieve the goals set forth in the State Comprehensive Beach Management Plan;

(4) development of a program on public education and awareness of the importance of the beach/dune system, the project to be coordinated with the South Carolina Educational Television Network and Department of Parks, Recreation and Tourism;

(5) assistance to local-governments in developing the local comprehensive beach management plans.

(B) The plan provided for in this section is to be used for planning purposes only and must not be used by the council to exercise regulatory authority not otherwise granted in this chapter, unless the plan is created and adopted pursuant to Chapter 23 of Title 1.

HISTORY: 1988 Act No. 634, § 3, eff July 1, 1988; 1990 Act No. 607, § 3, eff June 25, 1990.

Editor's Note –

Section 5 of the 1990 Act No. 607, eff June 25, 1990, provides as follows:

"The General Assembly hereby recognizes the need for maintaining navigation inlets to promote commercial and recreational uses of our coastal waters and their resources. The General Assembly further recognizes that inlets alter the natural drift of beach-quality sand resources, which often results in these sand resources being deposited around shallow outer-bar areas instead of providing natural nourishment to the downdrift

beaches. Therefore, it is the intent of the General Assembly that:

(1) All construction and maintenance dredgings of beach-quality sand be placed on the downdrift beaches or, if placed elsewhere, and equivalent quality and quality of sand from an alternate location be placed on the downdrift beaches at no cost to the State and at a location acceptable to the South Carolina Coastal Council.

(2) On an average annual basis, a quantity of sand be placed on the downdrift beaches equal to the natural net annual longshore sediment transport at no cost to the State. The placement location and quantities based on natural net annual longshore transport be established by the council and the sand quality be acceptable to the council.

(3) The council may promulgate regulations necessary to implement the provisions of this section."

Section 8 of 1990 Act No. 607, eff June 25, 1990, provides as follows:

"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event of events which occurred before the effective date of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

Effect of Amendment –

The 1990 amendment rewrote this section.

§ 48-39-330. Disclosure statement.

Thirty days after the initial adoption by the council of setback lines, a contract of sale or transfer of real property located in whole or in part seaward of the setback line or the jurisdictional line must contain a disclosure statement that the property is or may be affected by the setback line, baseline, and the seaward corners of all habitable structures referenced to the South Carolina State Plan Coordinate System (N.A.D. – 1983) and include the local erosion rate most recently made available by the council for that particular standard zone or inlet zone as applicable. Language reasonably calculated to call attention to the existence of baselines, setback lines, jurisdiction lines, and the seaward corners of all habitable structures and the erosion rate complies with this section.

The provisions of this section are regulatory in nature and do not affect the legality of an instrument violating the provisions.

HISTORY: 1988 Act No. 634, § 3 eff July 1, 1988; 1990 Act No. 607, § 3 eff June 25, 1990.

Editor's Note –

Section 5 of 1990 Act No. 607, eff June 25, 1990 provides as follows:

"The General Assembly hereby recognizes the need for maintaining navigation inlets to promote commercial and recreational uses of our coastal waters and their

resources. The General Assembly further recognizes that inlets alter the natural drift of beach-quality sand resources, which often results in these sand resources being deposited around shallow outer-bar areas instead of providing natural nourishment to the downdrift beaches. Therefore, it is the intent of the General Assembly that:

(1) All construction and maintenance dredgings of beach-quality sand be placed on the downdrift beaches or, if placed elsewhere, and equivalent quality and quantity of sand from an alternate location be placed on the downdrift beaches at no cost to the State and at a location acceptable to the South Carolina Coastal Council.

(2) On an average annual basis, a quantity of sand be placed on the downdrift beaches equal to the natural net annual longshore sediment transport at no cost to the State. The placement location and quantities based on natural net annual longshore transport be established by the council and the sand quality be acceptable to the council.

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"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this

act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

Effect of Amendment –

The 1990 amendment rewrote this section.

§ 48-39-340. Distribution of funding.

Funding for local governments to provide for beachfront management must be distributed in a fair and equitable manner. Consideration must be given to the size of the locality, the need for beach management in the area, the cost/benefits of expenditures in that area, and the best interest of the beach/dune system of the State as established by priority by the council.

HISTORY: 1988 Act No. 634, § 3 eff July 1, 1988; 1990 Act No. 607, § 3 eff June 25, 1990.

Editor's Note –

Section 5 of 1990 Act No. 607, eff June 25, 1990 provides as follows:

"The General Assembly hereby recognizes the need for maintaining navigation inlets to promote commercial and recreational uses of our coastal waters and their resources. The General Assembly further recognizes that inlets alter the natural drift of beach-quality sand resources, which often results in these sand resources being deposited around shallow outer-bar areas instead of providing natural nourishment to the downdrift

beaches. Therefore, it is the intent of the General Assembly that:

(1) All construction and maintenance dredgings of beach-quality sand be placed on the downdrift beaches or, if placed elsewhere, and equivalent quality and quantity of sand from an alternate location be placed on the downdrift beaches at no cost to the State and at a location acceptable to the South Carolina Coastal Council.

(2) On an average annual basis, a quantity of sand be placed on the downdrift beaches equal to the natural net annual longshore sediment transport at no cost to the State. The placement location and quantities based on natural net annual longshore transport be established by the council and the sand quality be acceptable to the council.

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HISTORY: 1988 Act No. 634, § 3, eff July 1, 1988; 1990 Act No. 607, § 3, eff June 25, 1990.

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(1) All construction and maintenance dredgings of beach-quality sand be placed on the downdrift beaches or, if placed elsewhere, an equivalent quality and quantity of sand from

an alternate location be placed on the downdrift beaches at no cost to the State and at a location acceptable to the South Carolina Coastal Council.

(2) On an average annual basis, a quantity of sand be placed on the downdrift beaches equal to the natural net annual longshore sediment transport at no cost to the State. The placement location and quantities based on natural net annual longshore transport be established by the council and the sand quality be acceptable to the council.

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Effect of Amendment –

The 1990 amendment made minor grammatical changes in this section.

§ 48-39-350. Local comprehensive beach management plan.

(A) The local governments must prepare by July 1, 1991, in coordination with the council, a local comprehensive beach management plan which must be submitted for approval to the council. The local comprehensive beach management plan, at a minimum, must contain all of the following:

(1) an inventory of beach profile data and historic erosion rate data provided by the council for each standard erosion zone and inlet erosion zone under the local jurisdiction;

(2) an inventory of public beach access and attendant parking along with a plan for enhancing public access and parking;

(3) an inventory of all structures located in the area seaward of the setback line;

(4) an inventory of turtle nesting and important habitats of the beach/dune system and a protection and restoration plan if necessary;

(5) a conventional zoning and land use plan consistent with the purposes of this chapter for the area seaward of the setback line;

(6) an analysis of beach erosion control alternatives, including renourishment for the beach under the local government's jurisdiction;

(7) a drainage plan for the area seaward of the setback zone;

(8) a post disaster plan including plans for cleanup, maintaining essential services, protecting public health, emergency building ordinances, and the establishment of priorities, all of which must be consistent with this chapter;

(9) a detailed strategy for achieving the goals of this chapter by the end of the forty-year retreat period. Consideration must be given to relocating buildings, removal of erosion control structures, and relocation of utilities;

(10) a detailed strategy for achieving the goals of preservation of existing public access and the enhancement of public access to assure full enjoyment of the beach by all residents of this State.

The plan must be updated at least every five years in coordination with the council following its approval. The local governments and the council must implement the plan by July 1, 1992.

(B) Notwithstanding the provisions of Section 48-39-340, if a local government fails to act in a timely manner to establish and enforce a local coastal beach management plan, the council must impose and implement the plan or the State Comprehensive Beach Management Plan for the local government. If a local government fails to establish and enforce a local coastal beach management plan, the government automatically loses its eligibility to receive available state-generated or shared revenues designated for beach/dune system protection, preservation, restoration, or enhancement, except as

directly applied by the council in its administrative capacities.

HISTORY: 1988 Act No. 634, § 3 eff July 1, 1988; 1990 Act No. 607, § 3 eff June 25, 1990.

Editor's Note –

Section 5 of 1990 Act No. 607, eff June 25, 1990 provides as follows:

"The General Assembly hereby recognizes the need for maintaining navigation inlets to promote commercial and recreational uses of our coastal waters and their resources. The General Assembly further recognizes that inlets alter the natural drift of beach-quality sand resources, which often results in these sand resources being deposited around shallow outer-bar areas instead of providing natural nourishment to the downdrift beaches. Therefore, it is the intent of the General Assembly that:

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(2) On an average annual basis, a quantity of sand be placed on the downdrift beaches equal to the natural net annual longshore sediment transport at no cost to the State. The placement location and quantities based on natural net annual longshore transport be established

by the council and the sand quality be acceptable to the council.

(3) The council may promulgate regulations necessary to implement the provisions of this section."

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"Except as otherwise specifically provided in this act, the provisions of this act shall be applied only prospectively and shall not affect any legal action commenced or any cause of action accruing as a result of an event or events which occurred before the effective date of this act. Any such action must be governed by the provisions of Sections 48-39-10 through 48-39-360, as amended by Act 634 of 1988, and in existence before the effective date of this act."

Effect of Amendment –

The 1990 amendment rewrote this section.

§ 48-39-355. Documentation of authorized activity.

A permit is not required for an activity specifically authorized in this chapter. However, the council may require documentation before the activity begins from a person wishing to undertake an authorized construction or reconstruction activity. The documentation must provide that the construction or reconstruction is in compliance with the terms of the exemptions or exceptions provided in Sections 48-39-280 through 48-39-360.

HISTORY: 1990 Act No. 607 § 3, eff June 25, 1990.

Editor's Note –

Section 5 of 1990 Act No. 607, eff June 25, 1990 provides as follows:

"The General Assembly hereby recognizes the need for maintaining navigation inlets to promote commercial and recreational uses of our coastal waters and their resources. The General Assembly further recognizes that inlets alter the natural drift of beach-quality sand resources, which often results in these sand resources being deposited around shallow outer-bar areas instead of providing natural nourishment to the downdrift beaches. Therefore, it is the intent of the General Assembly that:

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§ 48-39-360. Application of chapter.

The provisions of Sections 48-39-250 through 48-39-355 do not apply to an area which is at least one-half mile inland from the mouth of an inlet.

HISTORY: 1988 Act No. 634, § 3 eff July 1, 1988; 1990 Act No. 607, § 3 eff June 25, 1990.

Editor's Note –

Section 5 of 1990 Act No. 607, eff June 25, 1990 provides as follows:

"The General Assembly hereby recognizes the need for maintaining navigation inlets to promote commercial and recreational uses of our coastal waters and their resources. The General Assembly further recognizes that inlets alter the natural drift of beach-quality sand resources, which often results in these sand resources being deposited around shallow outer-bar areas instead of providing natural nourishment to the downdrift

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Effect of Amendment –

The 1990 amendment substituted "Sections 48-39-250 through 48-39-360" for "this chapter".

APPENDIX E

STATE OF SOUTH CAROLINA COUNTY OF CHARLESTON David H. Lucas, Plaintiff, -vs- South Carolina Coastal Council, an agency of the State of South Carolina, Defendant.	)	IN THE COURT OF COMMON PLEAS C/A No. 88-CP-10- COMPLAINT

The plaintiff above named, complaining of the defendant, alleges:

1. The plaintiff is a citizen and resident of the State of South Carolina and is the owner of real property located on the Isle of Palms in Charleston County, South Carolina, said property consisting of two ocean-front lots which are more particularly described in Exhibits "A" and "B" attached hereto.

2. The defendant, South Carolina Coastal Council, is an agency and instrumentality of the State of South Carolina, created by Act 123 of the 1977 South Carolina General Assembly, and exercises regulatory authority and power over both public and private lands and waters in the coastal zone of the State of South Carolina pursuant to the powers granted to it by the South Carolina General Assembly.

3. On June 8, 1988 the Governor of the State of South Carolina signed into law Act 634 of the 1988 General Assembly commonly known as the "Beachfront Management Act," which act amends Act 123 of 1977 and seeks to impose restrictions on future development of ocean-front property, such as the property of the plaintiff, by way of imposing statutorily mandated "setback" lines not previously required by law.

4. Pursuant to Act 634 of 1988, the defendant has established "setback lines" and has published data and methodologies to determine the precise location of these "setback lines" on individual parcels of privately-owned property.

5. The plaintiff, relying on the information data and methodologies supplied by the defendant, has located the "setback lines" upon his property that is the subject of this action. The set back lines transverse both lots in close proximity to "Beachwood East Road" so that the vast majority of both lots lie [sic] seaward of the statutorily-imposed setback lines.

6. The location of the "setback lines" on plaintiff's property, due to the development and building restrictions imposed by Act 634 of 1988 as well as the "administrative interpretations" adopted by the defendant, prohibit any kind of development, building or construction on plaintiff's property. Resultingly, plaintiff has been denied all reasonable use of his property, has been denied all reasonable investment-backed expectations otherwise enuring to the plaintiff by his ownership of this property, has been deprived of all incidence of private ownership of this property, has been denied the unrestricted right of

use, enjoyment and disposal of the property, and the property has been rendered valueless by the action of the defendant, all to the damage of the plaintiff.

7. In South Carolina the "public beach" or area of beach subject to unrestricted public use, extends only from the mean high water mark to the mean low water mark of the Atlantic Ocean. Plaintiff's property lies entirely above and some distance inland from the mean high water mark of the Atlantic Ocean.

8. Upon information and belief, prior to the passage of Act 634 and the imposition of "setback lines" on plaintiff's property, the plaintiff's property had a market value in excess of $2,000,000; upon information and belief, because of the location of the "setback lines" on plaintiff's property and the restriction on development imposed by the defendant pursuant to Act 634, the plaintiff's property has no market or other economic value.

9. The restrictions imposed on plaintiff's property by the defendant are arbitrary and capricious and have affected a taking of the plaintiff's property for the purpose of benefiting the public of the state of South Carolina without the payment of just compensation.

10. The stated purpose of Act 634 of 1988 is to protect the public beach from erosion and the harmful effects of erosion-control devices such as bulkheads, riprap and seawalls. The plaintiff's property, however, is in its entirety landward of the "public beach", has no erosion-control devices on or in front of it, and is presently suitable in its natural state for residential development.

11. The defendant's restriction on the use and enjoyment of the plaintiff's property has affected a taking of plaintiff's property without the payment of just compensation in violation of Article I, Section 13 of the South Carolina Constitution and Amendment V of the United States Constitution.

12. The defendants action in requiring plaintiff to leave his property in an undeveloped state thus depriving plaintiff of the use and enjoyment of his property simply because the property is located on the ocean front, denies the plaintiff the equal protection of the laws guaranteed under the United States Constitution and the Constitution of the State of South Carolina.

WHEREFORE, the plaintiff demands that the defendant pay to him just compensation for the unlawful and unconstitutional taking of his property in an amount to be determined by the trier of facts; that the defendant pay to the plaintiff damages for the temporary taking of his property from June 8, 1988 until such time as this matter is finally resolved; that the defendant pay to the plaintiff attorneys' fees, expert witness fees and costs reasonably associated with bringing this action, and that the court award such other and further relief as it may deem just and reasonable.

/s/ Gedney M. Howe, III
Gedney M. Howe, III
P.O. Box 1440
Charleston, SC 29402

/s/ Ellison D. Smith, IV
Ellison D. Smith, IV

SMITH & BUNDY
P.O. Box 579
Charleston, SC 29402

Charleston, South Carolina

January 5, 1989

APPENDIX F

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOHN V. ESPOSITO, et al.

Plaintiff-Appellant,

v.

THE SOUTH CAROLINA COASTAL COUNCIL, a South Carolina governmental agency; JOHN C. HAYES, III, Chairman of the South Carolina Coastal Council; H. WAYNE BEAM, Executive Director of the South Carolina Coastal Council,

Defendants-Appellees.

No. 89-1840

NATURAL RESOURCES DEFENSE COUNCIL; SOUTH CAROLINA COASTAL CONSERVATION LEAGUE,

Amici Curiae.

BARNEY L. CHAVOUS; ODESSA K. CHAVOUS,

Plaintiffs-Appellees,

v.

THE SOUTH CAROLINA COASTAL COUNCIL, a South Carolina governmental agency,

Defendant-Appellant,

and

JOHN C. HAYES, III, Chairman of the South Carolina Coastal Council; H. WAYNE BEAM, Executive Director of the South Carolina Coastal Council,

Defendants.

No. 90-2367

NATURAL RESOURCES DEFENSE COUNCIL; SOUTH CAROLINA COASTAL CONSERVATION LEAGUE,

Amici Curiae.

Appeals from the United States District Court for the district of
South Carolina, at Beaufort.
Falcon B. Hawkins, Chief District Judge.
(CA-88-2055-D-1, CA-89-216-D-1)

Argued: July 18, 1990

Decided: July 3, 1991

Before RUSSELL, WIDENER, and HALL, Circuit Judges.

Affirmed in part and vacated and remanded in part by published opinion. Judge Widener wrote the majority opinion, in which Judge Russell joined. Judge Hall wrote a dissenting opinion.

COUNSEL

ARGUED: Nancy B. Tecklenburg, C. C. Harness, III, SOUTH CAROLINA COASTAL COUNCIL, Charleston, South Carolina, for Appellants. John V. Esposito, Randall M. Chastain, Hilton Head Island, South Carolina, for Appellees. **ON BRIEF:** William L. Want, SOUTH CAROLINA COASTAL COUNCIL, Charleston, South Carolina, for Appellants. Robertson H. Wendt, Jr., HOLLINGS & NETTLES, P.A., Charleston, South Carolina; Nina M. Sankovitch, NATURAL RESOURCES DEFENSE COUNCIL, New York, for Amici Curiae.

OPINION

WIDENER, Circuit Judge:

These consolidated cases deal with challenges to the judgment of the district court concerning claims that the defendants violated the fifth and fourteenth amendments of the United States Constitution. The district court in *Esposito*, No. 89-1140, rejected the plaintiffs' claim that South Carolina's Beachfront Management Act (Act) violated the due process and takings clauses of the fifth and

fourteenth amendments. In *Chavous*, however, No. 90-2367, the district court entered judgment for the plaintiffs on their claim that the Act violated the takings clause and enjoined its enforcement. We affirm the district court's judgment in *Esposito*, and vacate on account of mootness its judgment in *Chavous*.

I.

In 1988, the General Assembly of South Carolina enacted the Beachfront Management Act, which amended certain sections of Title 48, Chapter 39 of the Code of Laws of South Carolina. This legislation recited the Assembly's finding that "[m]any miles of South Carolina's beaches have been identified as critically eroding." 1988 Act No. 634, § 1. The Assembly noted that the beach/dune system along the coast served as a storm barrier protecting lives and property, generated a substantial portion of the State's tourism revenues, provided a habitat for species of plants and animals, and offered a natural, healthy environment enhancing the well-being of the State's citizens. 1988 Act No. 634, § 1(a)-(d). The legislation further stated that the beach/dune system had been threatened by the presence of unwise development "too close" to the beaches and by the use of certain hard erosion control devices that had actually increased the vulnerability of beachfront property to damage. 1988 Act No. 634, § 1. The Assembly accordingly approved a "comprehensive, long-range beach management plan" entailing "a gradual retreat from the system over a forty-year period." 1988 Act No. 634, § 2.

Among the numerous specific provisions enacted to effectuate this plan, we need discuss only those implicated by the present actions. The plaintiffs' claims arose through the operation of the statutory requirement that the defendant, South Carolina Coastal Council, establish certain lines in each county fronting the Atlantic Ocean, S.C. Code Ann. § 48-39-280(D) (Supp. 1989). The first of these lines was the "baseline." As applied to the property involved in these actions, the Act required that this line be drawn at "the location of the crest of an ideal primary oceanfront sand dune" or, in areas where the shoreline had been altered by the construction of erosion control or other manmade devices, "where the crest of an ideal primary oceanfront sand dune . . . would be located if the shoreline had not been altered." S.C. Code Ann. § 48-39-280(A)(1) (Supp. 1989). The Act next directed that a "setback line" be calculated. In order to implement the statute's stated policy of retreat, this line was established "landward of the baseline . . . at a distance which is forty times the average annual erosion rate," but "no less than twenty feet from the baseline." S.C. Code Ann. § 48-39-280(B)(1) (Supp. 1989). The Assembly provided that these requirements be implemented by "utilizing the best available information and data" and set out specific procedures to be followed by the South Carolina Coastal Council in establishing the various lines. S.C. Code Ann. § 48-39-280(A) (Supp. 1989).

The plaintiffs in both *Esposito* and *Chavous* are owners of real property located in the Town of Hilton Head, Beaufort County, South Carolina. The lots of the *Esposito* plaintiffs have been improved with residential dwellings. In terms of the provisions of the Act, most of

these dwellings were situated at least partially seaward of the baseline or within what the plaintiffs call the "dead zone," an area extending twenty feet landward of the baseline. The Act stated that any habitable structure "destroyed beyond repair" by natural causes or fire could not be rebuilt seaward of the baseline or within the dead zone. S.C. Code Ann. § 48-39-290(B) (Supp. 1989).[1] An administrative interpretation defined "destroyed beyond repair" to mean that "more than two thirds (66 2/3%) of the building components making up the structure are damaged to such a degree that replacement is required in order for the structure to be habitable, functional or sound." The Act also regulated attempts to make additions to existing structures and install recreational amenities. S.C. Code Ann. § 48-39-290(B) (Supp. 1989). The plaintiffs claimed that by virtue of these restrictions, especially the prohibition on the reconstruction of their dwellings in the case of destruction beyond repair, South Carolina had unlawfully taken their private property

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[1] We note that there appears to be a conflict between certain provisions of § 48-39-290 (Supp. 1989). Section (B) initially states that habitable structures destroyed beyond repair may be reconstructed "seaward of the setback line," provided that certain requirements are met. The statute later states, however, after section (B)(8), that "[n]othing in this section allows any rebuilding in the area from the baseline to twenty feet landward of the baseline." While the parties appear to agree that the latter provision controls, we express no opinion concerning which provision should be construed to govern activity in the area extending twenty feet to landward from the baseline. Rather, we will apply the more restrictive interpretation for purposes of reviewing the plaintiffs' claim that the statutory restrictions rise to the level of a taking.

without just compensation and violated the due process clause.

The *Chavous* plaintiffs, on the other hand, own a vacant lot with no improvements. Under the statutory scheme, approximately ninety percent of their lot was situated seaward of the baseline or within the dead zone. The Act stated that no part of a new habitable structure could be constructed seaward of the baseline or in the dead zone. S.C. Code Ann. § 48-39-300 (Supp. 1989). The plaintiffs claimed that this prohibition of construction amounted to an unlawful taking of their private property without compensation and a violation of due process.

Before considering the substance of these claims, we should take into account the effect of recent amendments to the Act upon our review.[2] The plaintiffs' claims and the district court's judgments involved, of course, only the effects of the provisions of the 1988 version of the statute.

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[2] In 1990, the General Assembly returned to the Act and made several significant changes in the statutory scheme discussed above. The 1990 Act eliminated the dead zone so that activity in the area twenty feet landward of the baseline is now governed by the less restrictive regulations that apply to the rest of the area between the baseline and the setback line. S.C. Code Ann. § 48-39-290(B) (Supp. 1990). In addition, a definition of "[d]estroyed beyond repair" as meaning "more than sixty-six and two-thirds percent of the replacement value of the habitable structure . . . has been destroyed" was codified. S.C. Code Ann. § 48-39-270(11) (Supp. 1990). Furthermore, the amendment gave the South Carolina Coastal Council authority to issue special permits allowing construction or reconstruction of habitable structures under certain conditions, even if such structures are located seaward of the baseline. S.C. Code Ann § 48-39-290(D) (Supp. 1990).

The enactment of the 1990 Act during the pendency of this appeal, with its provisions for special permits and other changes that may affect the plaintiffs, does not relieve us of the need to address the plaintiffs' claims under the provisions of the 1988 Act. Even if the amended Act cured all of the plaintiffs' concerns, the amendments would not foreclose the possibility that a taking had occurred during the years when the 1988 Act was in effect. See *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 911 F.2d 1331, 1335 (9th Cir. 1990). As the Supreme Court has recognized, "the government may elect to abandon its intrusion or discontinue regulations," but "no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 317, 321 (1987). We therefore must consider whether the 1988 Act effected a taking or due process violation during the period that it was in effect.[3]

II.

The fifth amendment, which provides in relevant part that "private property [shall not] be taken for public

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[3] The plaintiffs in both *Esposito* and *Chavous* appear to urge us to consider also their takings and due process claims under the provisions of the 1990 Act. Because these amendments were enacted subsequent to the district court's judgments, there has been no decision by that court upon the question of whether the revised statutory scheme amounts to a taking or violation of due process. These questions, therefore, are not properly before us and we express no opinion upon them.

use without just compensation," applies to the States through the fourteenth amendment. See *Chicago Burlington and Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897). As an initial matter, we note that the courts have traditionally upheld the validity of setback lines and similar land use regulations against constitutional challenges. E.g. *Gorieb v. Fox*, 274 U.S. 603 (1927); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Welch v. Swasey*, 214 U.S. 91 (1909). The plaintiffs argue, however, that the present case is distinguishable from these prior decisions and we therefore review their claims in light of the more recent Supreme Court takings clause cases.

In *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 485 (1987) (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)), the Court stated that a land use regulation may constitute a taking if it "does not substantially advance legitimate state interests. . . . or denies an owner economically viable use of his land." The district court in *Esposito* addressed the first prong of that takings test by holding that the State had "an important interest" in protecting its beaches and that the challenged statutes were "substantially related" to furthering this goal. The *Esposito* plaintiffs attack this conclusion, contending that the Act was neither based on a legitimate State interest nor substantially related to any proper State goal.

While the Court may not have elaborated on the standards for determining what constitutes a "legitimate state interest" or what relation between a regulation and the State's interest meets the requirement that one "substantially advance" the other, it has indicated that "a broad range of governmental purposes and regulations" will satisfy these requirements. *Nollan v. California Coastal*

Comm'n, 483 U.S. 825, 834-35 (1987). We are in agreement with the district court that the Assembly's stated purpose to "protect, preserve, restore, and enhance the beach/dune system" constituted a legitimate State interest and exercise of the police power of the State. South Carolina's beach/dune system is a valuable resource that not only protects life and property from the dangers of the ocean, but also provides a source of recreation and tourism-related revenue. The State's interest here was of the same nature as the approved in *Keystone*, 480 U.S. at 488, where the court found that Pennsylvania had acted "to protect the public interest in health, the environment, and the fiscal integrity of the area.[4]

We further believe that the means chosen by the legislature bore a substantial relation to its goal of protecting this valuable resource. While the *Esposito* plaintiffs urge us to hold that the Assembly's policy of withdrawal of building seaward of the setback line is not a viable response to the situation of beachfront erosion we view the matter as one in which "[s]tate legislatures. . . . who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character and degree of regulation which these new and perplexing conditions require." *Gorieb v. Fox*, 274 U.S. at 608. The record in this case

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[4] In *Lucas v. South Carolina Coastal Council*, No. 23342, ___ S.C. ___ (February 11, 1991), the South Carolina Supreme Court on a fact situation akin to that of the *Chavous* plaintiffs, held there was no taking of a beachfront plaintiff's property by the enforcement and application of the 1988 Beachfront Management Act involved here. The Court stated, among other things, that it followed the majority opinion in *Keystone*.

indicates that the decision to adopt a strategy of gradually withdrawing unwise development from the beach/dune system was a logical and sufficiently well-founded approach to dealing with beachfront erosion by attempting to restore the natural equilibrium between sand supply, wind, and waves. Having found that the "essential nexus," *Nollan*, 483 U.S. at 837, between the State's interest and its chosen means is present in this case, we will not second-guess the Assembly's decision.

The second prong of the takings analysis requires an inquiry into whether the Act denied the *Esposito* plaintiffs the economically viable use of their property. In *Penn Central Transportation Company v. New York*, 438 U.S. 104, 124 (1978), the Court identified several factors as particularly significant in this inquiry:

> The economic impact of the regulation of the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. . . . So too, is the character of the governmental action.

See *Georgia Outdoor Advertising v. City of Waynesville*, 900 F.2d 783, 787 (4th Cir. 1990); *Naegele Outdoor Advertising, Inc. v. City of Durham*, 844 F.2d 172, 176 (4th Cir. 1988). The *Esposito* plaintiffs do not contend that the character of the governmental action in this case is the type of physical invasion or appropriation for public use that readily leads to a finding that a taking has occurred. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). Rather, they argue that the enactment of the Act

drastically diminished the value of their property.[5] They contend that because their property had significantly less economic market value after passage of the Act, they were effectively deprived of their right and expectations of being able to sell and borrow money against their property.

In response to these contentions, we note that the courts have traditionally looked to the existing use of property as a basis for determining the extent of interference with the owner's "primary expectation concerning the use of the parcel." *Penn Central*, 438 U.S. at 136. We find that the Act permitted the *Esposito* plaintiffs to

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[5] The district court correctly drew attention to the "distinction between a claim that the mere enactment of a statute constitutes a taking and a claim that the particular impact of government action on a specific piece of property requires the payment of just compensation." *Keystone*, 480 U.S. at 494; see *Beacon Hill Farm Assocs. v. Loudoun County Supervisors*, 875 F.2d 1081 (4th Cir. 1989). In the present action, it appears that the rebuilding provision of which the plaintiffs complain has not actually been applied to any piece of property. None of the *Esposito* plaintiffs had their homes destroyed beyond repair or were denied permission to rebuild by operation of the statute. Rather, their alleged injuries rest, like those of the plaintiff in *Euclid v. Ambler Realty Co.*, 272 U.S. at 395, "upon the broad ground that the mere existence and threatened enforcement of the [statute], by materially and adversely affecting values and curtailing the opportunities of the market., constitute a present and irreparable injury." In order to succeed on their claim, therefore, the plaintiffs must face the admittedly "uphill battle" of proving that the mere enactment of the Beachfront Management Act so denied them the economically viable use of their property as to constitute a taking. *Keystone*, 480 U.S. at 495.

continue their existing use of their property and dwellings in the same manner that they could have used the property prior to its enactment. The plaintiffs, in fact, have stipulated that "[n]one of the Plaintiffs in the Esposito case have discontinued use of their property, as it was used before enactment of the subject Statutes. . . ." They continued to retain the fundamental incidents of ownership, including the right to possess the property, exclude others from it, alienate the property, and continue to use it for residential and recreational purposes; and they were significantly diminished only in their discretion to rebuild a structure in the speculative event of its virtually complete destruction. Although we are cognizant of the plaintiffs' claim that passage of the Act affected the value of the property and its potential attractiveness on the market, the Supreme Court has observed that neither diminution in property value, *Penn Central*, 438 U.S. at 131, nor "even substantial reduction of the attractiveness of the property to potential purchasers," *Kirby Forest Indus. v. United States*, 467 U.S. 1, 15 (1984), will suffice to establish that a taking has occurred. In light of the plaintiffs' continued use of the property precisely as they used it prior to the passage of the Act, we are of opinion that the *Esposito* plaintiffs have not established that the regulation in question was "so onerous that it [had] the same effect as an appropriation of the property through eminent domain or physical possession." *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 199 (esp. n.17, at 199) (1985).

We also reject the *Esposito* plaintiffs' due process claim. For the statute in question to held in violation of the fourteenth amendment, it must be found "clearly

arbitrary and unreasonable, having no substantial relationship to the public health, safety, morals or general welfare." *Beacon Hill Farm Assocs. v. Loudoun County Supervisors*, 875 F.2d 1081, 1085 n.5 (4th Cir. 1989) (quoting *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926)). For the reasons discussed previously, we hold that the 1988 Act was substantially related to South Carolina's legitimate interest in protecting its beaches and therefore reject the plaintiffs' due process claim.

We next turn to the judgment of the district court in *Chavous*. In considering the plaintiffs' takings claim,[6] the district court concluded that the regulations contained in the Act did indeed bear a substantial relation to a legitimate State interest. On the second prong of the test, however, the district court decided that the Act had denied the *Chavous* plaintiffs the economically viable use of their property. The court enjoined further enforcement of the Act against the plaintiffs.

The defendants urge us to reverse the judgment of the district court and hold that the Act did not work a taking of the plaintiffs' property. The plaintiffs, on the other hand, ask that we affirm the judgment with its injunction prohibiting enforcement of the Act against them. We decline to take either course. The injunctive remedy granted by the district court has become pointless because the enjoined statute has been superseded by a significantly amended statutory scheme and is no

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[6] The *Chavous* plaintiffs also advanced a due process claim, but the district court declined to rule upon it after concluding that the plaintiffs were entitled to relief on their takings claim.

longer in effect. See *Tahoe Sierra Preservation Council*, 911 F.2d at 1335-36. The district court, moreover, held that the remedy of damages was barred by the eleventh amendment and the plaintiffs have not challenged this ruling on appeal. We have no jurisdiction over a claim on which no effective relief can be granted. *Mills v. Green*, 159 U.S. 651, 653 (1895). In remarkably similar context, we have only recently held that a changed zoning regulation rendered moot the contest of a prior regulation. *11126 Baltimore Blvd. v. Prince Georges County*, 924 F.2d 557 (4th Cir. 1991). In view of the mootness of the plaintiffs' claim for relief, we express no opinion concerning the correctness of the district court's determination that the 1988 Act effected a taking of the *Chavous* property.

III.

For the reasons discussed above, we affirm the district court's judgment in *Esposito*. In *Chavous*, we vacate the judgment of the district court and remand to the district court with instructions that the case be dismissed as moot. See *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

Accordingly, the district court's judgment in 89-1840 is

AFFIRMED and the district court's judgment in 90-2367 is

VACATED AND REMANDED WITH INSTRUCTIONS.

HALL, Circuit Judge, dissenting:

Let me say, first, that I thoroughly agree with the purposes of the Beachfront Management Act, and second, that my agreement or disagreement with and the wisdom or folly of the Act ought not bear upon whether just compensation should be paid for its effectuation. The Just Compensation Clause is not a miniature variant of substantive due process, ready to slap the government with monetary liability where we believe a regulation is foolish yet not so utterly silly that we should strike it down in its entirety. I hope and expect that the legislative and executive branches will be wise, and that the "public use" for which they take, damage, destroy or diminish private property will be admirable. Nonetheless, the Just Compensation Clause does not apply only to poor governmental choices.

I.

Before going on to our disagreements, I concur in the majority's judgment that the substantive due process claim of the *Esposito* plaintiffs was properly rejected by the district court. I cannot find fault in either the legislative end or means:

II.

It is all too easy in a takings case to become enmeshed in the various tests, factors, and doctrines the Supreme Court has applied through the years. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) (three-factor test); *Agins v. Tiburon*, 447 U.S. 255 (1980)

(two-part test); *Hodel v. Indiana*, 452 U.S. 314 (1981) (second *Agins* test only – "no economically viable use"); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (per se rule for "permanent physical occupations"). The Court itself has admitted that its inquiry is essentially ad hoc. *Penn Central*, 438 U.S. at 124 (1978). The Court's "tests" are not rigid, unforgiving yardsticks to be slavishly applied notwithstanding a draconian result. On the contrary, the tests are guidelines for resolving the question at the bottom of every case: whether the claimant has been "forc[ed] . . . alone to bear [a] public burden[] which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).[1] Who should pay for South Carolina's sudden change in land-use policy? I believe that fairness and justice require the expense to be borne by the public.

We are confronted with the claims of particular persons resulting from the Act's devastating effect on the value of particular property. The plaintiffs do not attack the facial validity of the Act; they challenge it as applied to them. Hence, they need not make the strict showing

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[1] *Armstrong's* admonition lacks the intellectually calming appearance of predictability of a two- or three-factor "test." A legal standard no better defined than "fairness" leaves any judge ill at ease. Nonetheless, one recent commentator, after an exhaustive inventory and analysis of the Supreme Court's takings cases, concluded that the "moral justification" for placing a public burden on a single individual is the real issue on which any given case turns. Peterson, *The Takings Clause: In Search of Underlying Principles*, 77 Calif. L. Rev. 1299 (1989) (Part I) and 78 Calif. L. Rev. 53 (1990) (Part II).

required by the "no economically viable use" test. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987). The *Keystone* claimants failed to show how the challenged act affected any particular property; the *Esposito* defendants have done so. This case is not a facial challenge, and the "no economically viable use" test should not apply to it. I disagree, therefore, with footnote 5 of the majority opinion.

The factors the Supreme Court most often use in "as applied" takings cases were identified in *Penn Central*, 438 U.S. at 124. They are (i) the character of the governmental action, (ii) the extent of interference with reasonable investment-backed expectations, and (iii) the economic impact on the claimant. Application of these factors illustrates that "fairness and justice" require compensation in these cases.

The first prong of the *Penn Central* test – character of the governmental action – alludes to two potentially dispositive situations. If the government has committed or authorized a permanent physical invasion of private property, compensation is always required. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). If the government acts to prohibit a "noxious use" of property, compensation is almost never required. *Mugler v. Kansas*, 123 U.S. 623 (1887). South Carolina is not occupying the claimants' lots, and I reject the notion that a beachfront bungalow is a "noxious use" of property. *See infra* note 2. The character of the governmental action does not, therefore, resolve this case.

The second and third of the *Penn Central* factors weigh heavily in the landowners' favor. Before the 1988

amendments to the Act, the *Esposito* claimants' lots and homes ranged in value from $205,000 to $450,000. The lame duck nature of their use of the property has caused a substantial diminution in value – 35% in the opinion of the Beaufort County assessor. Most of the affected properties are mortgaged. Landowners who had equity that could serve as collateral for other loans have seen their nest egg disappear. Several lending institutions entirely refused to accept the doomed properties as security, notwithstanding that they still have some value. Prospective buyers have been equally hesitant. No affected properties have been sold since the Act amendments, though several have been on the market.

The "investment-backed expectations" of these landowners have been bludgeoned. Were these expectations "reasonable?" Lending institutions thought so. The county thought so, and assessed property taxes accordingly. The state allowed 49% of its coastline to become developed without interfering. Indeed, the state's coffers benefitted from the tax and tourism revenue generated by development of its beaches. I believe that a person could have purchased one of the affected properties with the reasonable expectation that his investment would not be affected by a drastic change in long-term land use policies.

Even under the majority's harsh application of the "no economically viable use" test, the Act would have clearly effected a compensable taking of the *Chavous* landowners' lots. The majority is able to avoid the issue[2]

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[2] The South Carolina Supreme Court addressed a *Chavous*-style case in *Lucas v. South Carolina Coastal Council*, ___ S.E.2d

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by a combination of two fortuities – subsequent amendments to the Act and the district court's unappealed holding that the Eleventh Amendment bars an award of just compensation against a state in a federal court.[3] I

(Continued from previous page)

___ (S.C. 1991). The state court, by a 3-2 margin, upheld the Act under the narrow "noxious use" exception to compensability. I agree entirely with the dissenters in *Lucas*. A noxious use is one that is "tantamount to a public nuisance." *Keystone*, 480 U.S. at 491. Living in a beach bungalow bears little resemblance to the noxious uses of property the Supreme Court has identified. *Mugler v. Kansas*, 123 U.S. 623 (1887) (distillery); *Reinman v. Little Rock*, 237 U.S. 171 (1915) (downtown livery stable); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (urban brickyard); *Miller v. Schoene*, 276 U.S. 272 (1928) (red cedar trees infected with apple rust disease near commercial orchards); and *Goldblatt v. Hampstead*, 369 U.S. 590 (1962) (quarrying below water table near town that depended on groundwater supply). The rapidity with which rental beach houses are gobbled up by the public causes me to doubt that they are, at least yet, generally regarded as "tantamount to a public nuisance." Finally, the Act's gradual forty-year retreat scheme, rather than immediate destruction of all offending structures, is clear proof that the *Esposito* claimants' residences are not dire threats to public safety and welfare. A "public nuisance" ought to be abated, not phased out through a half-lifetime of attrition.

[3] I agree that this latter holding is not before the court, but I have strong doubts that it was correct. As the majority notes, the Fifth Amendment's Just Compensation Clause was one of the earliest guarantees of the Bill of Rights to be enforced against the states through the Fourteenth Amendment. *Chicago Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226 (1897). Inasmuch as the Supreme Court has now held that the Just Compensation Clause always requires *compensation* for any taking, notwithstanding subsequent repeal or invalidation of the offending regulation, *First English Evangelical Lutheran*

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agree with the majority that a remand is necessary. However, I would not create a sweeping rule that a state whose statute has been enjoined may moot the injunction by tinkering with the statute. The recent amendments to the Act may or may not rectify its previous constitutional defects. At oral argument, the landowners made it clear that they still challenge the constitutionality of the Act, even as amended; there is plainly still a case or controversy, and I would not force the landowners to file a new suit. I would remand to permit the Coastal Council to move to dissolve the injunction.

III.

Legislatures and administrators undoubtedly often face the choice between purchasing a property right or regulating it away. In these days of deficits, it must be tempting to choose the costless regulatory route. Perhaps the Framers would have ensured more efficient government by permitting thievery of private property for public uses. However, they sacrificed the expedience of this approach in favor of a system that requires a proposed public use be one for which the public is willing to foot the bill. As Justice Holmes put it,

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Church v. Los Angeles County, 482 U.S. 304, 317 (1987), the Eleventh Amendment's general bar of damages against states must yield. Otherwise, a recalcitrant state could nullify the Just Compensation Clause by simply refusing to furnish a procedure to assess and award compensation. The Clause could be converted from a fundamental constitutional right into an empty admonition.

> a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the damage.

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

South Carolina now admits that its longstanding land use policies were ill-advised. Good government occasionally requires such admissions; history is a lesson, not a straightjacket. However, a governmental error is a collective error, and the burden of rectifying it should be borne by all, not just by those who unfortunately, but reasonably, relied on it.

Except as stated elsewhere in this opinion, I respectfully dissent.

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No. 91-453

In The

Supreme Court of the United States

October Term, 1991

DAVID H. LUCAS,

Petitioner,

vs.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The United States

BRIEF OF RESPONDENT IN OPPOSITION

C. C. HARNESS, III
Counsel for Respondent
South Carolina Coastal Council
4130 Faber Place, Suite 300
Charleston, SC 29405
(803) 744-5838

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does a compensable taking of property occur under the Fifth Amendment to the United States Constitution based solely upon a property owner's claim that a land use regulation denies him of "all economically viable use" of the property?

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STATEMENT OF THE CASE

Petitioner, David H. Lucas, is owner of two vacant oceanfront lots in the Beachwood East Subdivision at the Wild Dunes Development on the Isle of Palms, Charleston County, South Carolina. The Respondent, South Carolina Coastal Council, is a state agency, charged with the management of coastal resources within the eight coastal counties of South Carolina. Respondent, among other things, has responsibility for implementation of the 1988 Beachfront Management Act, Act 634, which amended the 1977 Coastal Zone Management Act.

The beach in question is very dynamic and the Petitioner's two lots have been under water or subject to tidal intrusion several times since 1963. Existing homes and man-made structures in the area have been threatened by erosion and various local and state permits have been issued in recent years for erosion abatement projects including sand scraping, sand bagging, sand nourishment and erosion control devices.

Pursuant to Section 48-39-280 of the Act, a setback scheme was established to control construction near the ocean. This scheme included a baseline located at the most landward shoreline in the past 40 years, a setback line located by multiplying 40 times the annual erosion rate, and a 20 foot no construction line located 20 feet behind the baseline.

Based upon the requirements of Section 48-39-280, the baseline was located in the road landward of the two lots in question. Due to the location of the baseline, no permanent man-made structure could be built upon the lots. Such construction was prohibited by Section

48-39-300 and use of the lots was limited to temporary construction and passive use.

After passage of the Act, the Petitioner filed an action in circuit court alleging, among other things, that the Act so restricted the use of his property that it amounted to taking of his property without the payment of just compensation in violation of the Fifth Amendment of the United States Constitution. He did not challenge the reasonableness or constitutional validity of the Act, but instead relied solely upon the loss of use and diminution in value of his property as justification for his taking claim.

The circuit court awarded compensation equal to the fair market value of the two lots as of July 1, 1988, in the amount of $1,170,000 together with real property taxes paid on the property since July 1, 1988, in the amount of $2,400 and simple interest on the mortgage balance of $495,000 at 11% in the amount of $58,987.50. The circuit court relied solely upon the loss of use and diminution in value of the property in determining whether an unconstitutional taking had occurred.

The Respondent, South Carolina Coastal Council, appealed the ruling to the South Carolina Supreme Court. The Supreme Court reversed the circuit court's decision and rejected the Petitioner's contention that the regulation amounted to an unconstitutional taking of his property so as to warrant an award of just compensation.

Prior to the South Carolina Supreme Court rendering its decision in February 1991, the state legislature amended the 1988 Beachfront Management Act to permit new construction seaward of the baseline pursuant to a

special permit. (See Section 48-39-290[D]) Pursuant to this section, the Appellant could seek permission to construct homes or other structures on the lots in question. The Appellant has not availed himself of this opportunity to date.

REASONS FOR DENYING THE PETITION FOR WRIT

I. The Petitioner failed to demonstrate that any special or important reason for the grant of certiorari exists, as required by Rule 10.

The Petitioner failed to demonstrate in its petition, that any special or important reason for granting Certiorari exists, as required by Rule 10. Rule 10 states that a "Petition for Writ of Certiorari will be granted only when there are special or important reasons therefore." Contrary to the way that the Petitioner characterizes the case, this decision is not in conflict with any decision of the United States Supreme Court, decisions of other state courts of last resort or decisions of the United States Court of Appeals. As seen in Part IV of this Brief, a mere challenge of the constitutionality of an act based upon loss of use or diminution in value alone is insufficient for award of compensation.

II. Petitioner failed to follow Supreme Court Rule 14(H) in that he did not show that federal questions relating to the Fifth Amendment as set forth in the petition were timely and properly raised in order to give this court jurisdiction for a writ of certiorari.

As conceded by the Petitioner, "[t]he question that the Petitioner expected would be resolved by the South

Carolina Supreme Court was whether the regulation so diminished his ownership interest in the coastal property as to constitute a taking requiring compensation under the Fifth Amendment." (Pet. 6-7) No challenge was made to the legitimacy of the public purpose or the counter balancing *importance* of the 1988 Beachfront Management Act in protecting the public from harm. Having ignored entirely any challenge to the state interest side of the takings formula, the Petitioner should be precluded from now seeking a remand of this case to the South Carolina Supreme Court.

The Petitioner's grounds for the Writ of Certiorari come with a certain amount of ill-grace because he blames the South Carolina Supreme Court for its failure to properly balance the private and public interest involved when in fact, he never raised any issue of the state interest. Instead, he relied solely upon his loss of use of the property. The South Carolina Supreme Court recognized this failure on the part of the Petitioner and that it was called upon "by the Petitioner to determine the sole question of whether a taking of property occurs when he is deprived, by operation of the regulation, of 'all economically viable use' of his property." *Lucas v. South Carolina Coastal Council*, ___ S.C. at ___, 404 S.E. 2d at 898.

Given that the Petitioner never took issue with the character of the governmental action nor the nature of the state's interest in the regulation at any point during the trial of this case, he failed to properly preserve his constitutional challenge to the state regulation. This is in violation of Rule 14(H).

III. The Petitioner has failed to exhaust his administrative remedies pursuant to Section 48-39-290(D), Code of Laws of South Carolina, 1976, as amended, that allows for application and issuance of permits to build structures other than erosion control structures or devices seaward of the baseline.

On June 25, 1990, subsequent to the filing of the action in circuit court but prior to the decision of the South Carolina Supreme Court, the 1988 Beachfront Management Act was amended to allow persons to make application for permits to construct man-made structures seaward of the baseline pursuant to Section 48-39-290(D). (A. 125) This allows for a variance from the hard and fast no construction rule of the 1988 Act. There is nothing in this amendment that prevents the Petitioner from applying for a special permit to construct habitable structures seaward of the baseline on the lots in question. To date, he has failed to avail himself of this administrative remedy.

The court has consistently held that a land-use challenge is not ripe where the property owner has not applied for a variance nor filed for a determination of whether a permit would be issued by the regulating agency. *Agins v. City of Tiburon*, 447 U.S. 225 (1980); *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer and Frates v. County of Yolo*, 477 U.S. 340 (1986). Based upon this line of cases, the Supreme Court should not consider this case until such time as the Petitioner avails himself of an obvious opportunity to obtain a permit not previously available to him at the time that the action was filed in circuit court.

IV. The South Carolina Supreme Court properly concluded that mere loss of use and diminution of property value alone is not sufficient to equate to an unconstitutional taking of private property pursuant to the Fifth Amendment.

The Petitioner contorts the South Carolina Supreme Court decision into a "bright-line test" in essence accusing the state's highest tribunal of deciding that proper exercise of police power automatically shields that exercise from the just compensation clause of the Fifth Amendment. However, even upon a surface review of the opinion, it is readily apparent that it is the Petitioner who seeks to formulate a "bright-line test", one that would state that loss of use and diminution of property value *alone* is sufficient to award compensation under the constitution. By sleight of hand, the Petitioner transfers his failure to consider the state interest over to the South Carolina Supreme Court complaining that the court failed to properly balance the "private and public interest in the takings calculus . . . " (Pet. 10)

The court, anticipating this legerdemain by the Petitioner, states that the Petitioner "fails to attack in any way the legislature's findings that new construction would cause serious public harm," and that the court was "in no position to, *sua sponte*, take issue with these legislative findings. *Lucas*, 404 S.E. 2d. at 900. All the Petitioner presented was the contention that a taking occurred because he was deprived of "all economically viable use."

The Respondent is unaware of any case which concludes that a taking occurs solely based upon loss of use or diminution in value. Since the South Carolina Supreme

Court was forced by Petitioner's inattention to the balancing of public and private interest to accept the rationality and importance of the legislature's findings and purposes of the Act, it would be a repudiation of the recent jurisprudence of this court to convert the usual careful factual inquiry into a "bright-line test" which ignores the importance of the state interest.

By way of the foregoing, it is ironic that the Petitioner complains that the South Carolina Supreme Court failed to "weigh both public and private interest in the taking calculus and instead relied upon a characterization of the police power implicated in the regulation." (Pet. 10) The simple fact is that the Petitioner brought only one side of the formula to the Court by insisting that the state's interest in the regulation was irrelevant.

For all practical purposes, the Petition should fail at this point. Assuming, however, for the sake of argument that the Petitioner can overcome his self-imposed hurdle of failure to challenge the nature of the state's interest in the regulation, the Petitioner misconstrues the court's decision in the context of *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987). Petitioner claims that the South Carolina Supreme Court read *Keystone* to mean that "a mere finding of a legitimate use of police power makes the regulation directed against a nuisance, and thus immune from compensation, even if the effect of regulation is to make the property all but worthless." (Pet. 7) In support of this erroneous conclusion, the Petitioner offers two reasons:

1. "The South Carolina Supreme Court assumed that *Keystone* in effect overturned *Agins* and *Nollan* to the extent that they

> require the public weal in regulation to be weighed against private expectation interests in the property being regulated." (Pet. 7)
>
> 2. The Court failed "to make the distinction between police power and nuisances." (Pet. 10)

The first allegation that the South Carolina Supreme Court misconstrued *Keystone* to read that a mere finding of a legitimate use of police power is an absolute bar to compensation, is without any support in a review of the opinion. The South Carolina Supreme Court articulated the variety of factors used by this court to determine whether or not a taking has occurred, including among those factors:

1. The economic impact of the regulation;
2. The regulation's interference with investment-backed expectations;
3. The character of the government action;
4. The nature of the state's interest in the regulation. *Lucas*, 404 S.E. 2d at 898-899 (citing *Keystone*, 470 U.S. at 485-493.)

Noting that one or more but fewer than all of these factors may be critical and determinative in a given case, the court cited *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), for the proposition that any permanent physical occupation occurring under government regulation is characterized as a taking. The opinion also recognized that the United States Supreme Court has never found a taking where the regulation exists to prevent serious public harm. *Lucas*, 404 S.E. 2d at 899; citing

Mugler v. Kansas, 123 U.S. 623 (1887); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Miller v. Schoene*, 276 U.S. 272 (1928); and *Goldblatt v. Hempstead*, 869 U.S. 590 (1962).

While the court accepts that there is a "special status" for regulations that prevent serious public harm and that this status generally insulates such regulation from takings claims, it specifically recognizes that "merely because the state acts within its public powers does not end the inquiry." *Lucas*, 404 S.E. 2d at 899-900. After noting this general rule that no taking occurs where the state seeks to protect against serious public harm, it finds that the Petitioner never offered the court an opportunity to consider the question of whether or not his situation was an exception to the general rule because Lucas never challenged any aspect of the public interest in the Beachfront Management Act. The court states:

> [W]e note that Lucas does not challenge the fact that legislation here is necessary to prevent serious injury to the community, nor does he contend that the setback requirements affecting him are unreasonable or disproportionate to the goal of preventing the specified harms. In fact, Lucas does not even seek an injunction to prevent enforcement of the Act. Instead, Lucas merely prays for damages and asserts that he is entitled to such, regardless of how the proposed use of his property harms the public, because all economically viable use of his land has been extinguished." *Lucas*, 404 S.E. 2d at 901.

In short, the South Carolina Supreme Court was never called upon by the Petitioner to balance the private

and public interest in the taking calculus. The court correctly cited *Keystone* in rejecting the proposition held by the coal owners that *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), overruled *Mugler* and its progeny, and the mechanical conclusion that "in *all* cases, when *all* economically viable use is extinguished by regulation, compensation is due." *Lucas*, 404 S.E. 2d at 900. (citing *Keystone*, 480 U.S. at 490-492)

The second error that the Petitioner assigns to the South Carolina Supreme Court in its reading of *Keystone* relates to the alleged failure to distinguish between police power and nuisances. Once again, the Petitioner calls upon this court to review an issue never raised at any level of the court proceedings. The South Carolina Supreme Court was not asked to measure the degree of public interest in the Beachfront Management Act.

Setting aside the fact that the distinction between police power and nuisances was not properly preserved, there is nothing in the majority Opinion of *Keystone* to indicate that such a distinction is appropriate for takings analysis, and in this case such an analysis would lead only to a distinction without any material difference.

First, the United States Supreme Court in *Keystone* looked beyond the legal nicety of distinguishing whether a state action is directed against common law nuisance or whether the action is directed against a public harm declared contrary to public health, safety and welfare by statute. *Keystone*, 480 U.S. at 490-493. Where a state restrains uses of property that are "tantamount to public nuisances" what difference can be made, other than that of a semantic nature, between calling the harm a nuisance

or calling it public harm contrary to public health, safety, or welfare? In the final analysis, it is the degree of harm against which the state acts that is important to the takings analysis theory, not the label given the harm.

In *Lucas*, the South Carolina Supreme Court assumed serious public harm based upon the findings and policies of the 1988 Beachfront Management Act. *Lucas*, 404 S.E. 2d at 895-898. The court states as follows:

> By failing to contest these legislative findings, Lucas concedes that the beach/dune area of South Carolina's shores is an extremely valuable public resource; that the erection of new construction, *inter alia*, contributes to the erosion and destruction of this public resource; and that discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm. This Court is likewise bound by these uncontested legislative findings. *Lucas*, 404 S.E. 2d 898.

The *Lucas* court, like the *Keystone* court, is dealing with a statute that acts "to protect the public interest in health, the environment, and the fiscal integrity of the area." *Keystone*, 470 U.S. at 488. There was no evidence presented by the Petitioner that would indicate that the interests protected by the Act are distinguishable from nuisances and review of the findings of the Act clearly set forth the extreme public importance of the legislation.

CONCLUSION

Based on the foregoing, the Respondent is informed and believes that the United States Supreme Court should deny the application for a Writ of Certiorari.

Respectfully submitted,

C. C. HARNESS, III
Counsel for Respondent
South Carolina Coastal Council
4130 Faber Place, Suite 300
Charleston, SC 29405
(803) 744-5838

(4)

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In The

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October Term, 1991

DAVID H. LUCAS,

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v.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of South Carolina

REPLY TO BRIEF IN OPPOSITION

A. CAMDEN LEWIS
Counsel of Record
LEWIS, BABCOCK & HAWKINS
1513 Hampton Street
P.O. Box 11208
Columbia, South Carolina 29211
(803) 771-8000

GERALD M. FINKEL
Attorney for Petitioner
FINKEL, GOLDBERG, SHEFTMAN & ALTMAN
P.O. Box 1799
Columbia, South Carolina 29202

DAVID J. BEDERMAN
Of Counsel
Emory University School of Law
Gambrell Hall
Atlanta, Georgia 30322

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY TO BRIEF IN OPPOSITION

Pursuant to Supreme Court Rule 15.6, the Petitioner, David H. Lucas, respectfully submits this Reply to Brief in Opposition.

ARGUMENT

THIS MATTER IS RIPE FOR ADJUDICATION

Respondent, South Carolina Coastal Council, maintains (Resp. 5) that Petitioner has failed to exhaust administrative remedies available to him, and, as a consequence, this matter is not ripe for adjudication and that the Petition should be denied. More specifically,

Respondent claims that section 48-39-290(D) of the South Carolina Beachfront Management Act ("the Act"), S.C. Code Ann. § 48-39-10 *et seq.* (Law Co-op. 1990) (reprinted at Pet. App. 125) provides the Petitioner with the possibility of seeking a special permit from the South Carolina Coastal Council at any time. Petitioner maintains that this argument is without substance.

Section 48-39-290(D) of the Act was adopted on June 25, 1990, more than two years after the South Carolina Coastal Council had drawn the setback lines which prevented David H. Lucas from building on his property.[1] For the two years prior to the 1990 amendments to the Act, the Petitioner was thus without *any* administrative remedy. During this two years period, the regulatory taking of the South Carolina Coastal Council could not have been relieved by any remedy, save for judicial review. Under *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), this temporary taking suffices to defeat any assertion that a State's regulation did not ripen, for purposes of justifiability, into a compensable action. *Id.* at 314-22. *First English* modified *Agins v. Tiburon*, 447 U.S. 255 (1980), and its progeny,[2] to

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[1] Presiding Judge Patterson of the Circuit Court of Charleston County found that the South Carolina Coastal Council's regulation against building went into effect against Mr. Lucas's property sometime after July 1, 1988. *See* Pet. App. 35. Judge Patterson also found that the prohibition on the construction on Mr. Lucas's property was permanent. *See* Pet. App. 37. This finding of fact has never been disturbed on appeal.

[2] *See e.g., MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985) (as cited at Resp. 5).

the extent those cases purported to deny review of temporary regulatory takings claims for lack of finality. *See First English*, 482 U.S. at 311-12. Mr. Lucas's case is in precisely the same posture as that of the petitioner in *First English*.[3]

And, as has already been noted (Pet. 8 n.2), the South Carolina Supreme Court, in rendering its judgment in this case of February 11, 1991, did not consider the impact of the 1990 amendment in providing administrative relief to property owners. The South Carolina Coastal Council sought to brief this issue, but this request was denied by that court. The South Carolina Supreme Court thus implicitly held that Mr. Lucas had a ripe claim for compensation under the Constitution's Fifth Amendment.

The issue of finality should not bar the Court's granting of a Petition of Certiorari in this case, if it is otherwise disposed to do so.

Respectfully submitted,

A. Camden Lewis
Counsel of Record
Lewis, Babcock & Hawkins
1513 Hampton Street
P.O. Box 11208
Columbia, South Carolina 29211
(803) 771-8000

Gerald M. Finkel
Attorney for Petitioner
Finkel, Goldberg, Sheftman & Altman
P.O. Box 1799
Columbia, South Carolina 29202

David J. Bederman
Of Counsel
Emory University School of Law
Gambrell Hall
Atlanta, Georgia 30322

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[3] This conclusion should suffice at this stage of the proceedings. Petitioner is not prepared to concede, of course, that he suffered only a temporary taking between June 1988 and June 1990.

(3)

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITIONER, DAVID H. LUCAS

RONALD A. ZUMBRUN
*EDWARD J. CONNOR, Jr.
*Counsel of Record
TIMOTHY V. KASSOUNI
Pacific Legal Foundation
2700 Gateway Oaks Drive,
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amicus Curiae, Pacific Legal Foundation

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITIONER, DAVID H. LUCAS

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of petitioner, David H. Lucas. Written consent to the filing of this brief has been granted by counsel for all parties. Copies have been lodged with the clerk of the Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public

interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an amicus curiae brief in this matter.

The opinion below holds that a valid exercise of the police power will insulate the government from a taking claim, even though the regulation deprives landowners of all economically viable use of property. Amicus submits that this holding conflicts with prior precedents of this Court, and of a United States Court of Appeals, wherein a taking has been found whenever a regulation fails to substantially advance legitimate governmental interests *or* deprives landowners of economically viable use of property. By failing to acknowledge this either/or takings test, the South Carolina Supreme Court has decided a federal question in a way that conflicts with applicable decisions of this Court and of a United States Court of Appeals.

STATEMENT OF THE CASE

The facts of the case are simple. Petitioner is the owner of two undeveloped oceanfront lots in Charleston County, South Carolina, which he purchased in 1986 for $975,000. On July 1, 1988, the South Carolina General Assembly adopted the Beachfront Management Act

(Act),[1] which regulated development along the South Carolina coastline by imposing statutorily mandated setback lines. The Beachfront Management Act is administered by respondent, South Carolina Coastal Council.

A setback line precluded petitioner from building residences or making any other reasonable economic use of his property. Petitioner instituted an action in the South Carolina Court of Common Pleas, asserting that the restriction on the use of his two lots amounted to a taking of his private property for a public use without just compensation. The court agreed and awarded petitioner just compensation for a regulatory taking. In reaching this conclusion, the court made the following finding of fact:

> "I find that the imposition of building restrictions on Lots 22 and 24 imposed by the South Carolina Coastal Council deprives [petitioner] of any reasonable economic use of the lots, has eliminated the unrestricted right of use, and renders them valueless." Order of the Court of Common Pleas at 5.

The South Carolina Supreme Court reversed the judgment of the Court of Common Pleas, though it in no way questioned the factual finding that the Beachfront Management Act effectively deprived petitioner of all economically viable use of property. The reversal was grounded instead on the court's belief that a valid exercise of the police power precludes a taking. Petitioner's argument that deprivation of economically viable use, in

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[1] S.C. Code Ann. § 48-39-10, *et seq.* (Law Co-op 1990).

and of itself, will work a taking, was dismissed as an "erroneous statement of existing law." *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 898 (1991).

The question presented to this Court is whether the Fifth Amendment to the United States Constitution requires the payment of just compensation when an alleged health and safety regulation denies a property owner all economically viable use. Amicus respectfully submits that the opinion of the South Carolina Supreme Court, which answered this question in the negative, is utterly irreconcilable with this Court's prior decisions and a recent decision of the Ninth Circuit.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10.1(b) and (c) lists among the considerations governing review on certiorari the circumstance when a state court of last resort has decided a federal question in a way that conflicts with the applicable decisions of the United States Supreme Court or of a United States Court of Appeals. Both grounds for review are present in this case.

I

THIS COURT HAS NEVER REQUIRED PROPERTY OWNERS TO INVALIDATE LAND USE REGULATIONS AS A PRECONDITION TO JUST COMPENSATION

In concluding that no taking occurred, the court below emphasized at length the fact that petitioner did not challenge the validity of the Beachfront Management

Act. This was construed as a "concession" that the Act was designed to abate the noxious use of property. *Lucas*, 404 S.E.2d at 900.

This Court has repeatedly held, however, that the Just Compensation Clause was designed " 'not to limit the governmental interference with property rights per se, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.' " *Preseault v. Interstate Commerce Commission*, 494 U.S. ___, 108 L. Ed. 2d 1, 13 (1990) (quoting *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 313 (1987) (emphasis in original)).

That property owners are not in every circumstance required to challenge the validity of the governmental regulation is evidenced by this Court's unambiguous takings test: a taking occurs "if the ordinance does not substantially advance legitimate state interests . . . *or* denies an owner economically viable use of his land." *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (citation omitted; emphasis added). *See also Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264, 295-96 (1981): "A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of land . . . . ' " *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987): "We have *long recognized* that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.' " (Quoting *Agins*, 447 U.S. at 260 (emphasis added; brackets in original).)

This two-prong test, like the Just Compensation Clause itself, does not refer to a "balancing" of public and private interests. Indeed, just compensation is mandated when governmental regulations are enacted for the benefit of the public. As the Fifth Amendment provides, "nor shall private property be taken *for public use* without just compensation." (Emphasis added.) To require property owners in every instance to challenge the validity of the governmental regulation would twist the Constitution into the following: "nor shall private property be taken without just compensation, *unless* for a public use."

This Court's decision in *First English*, and its unambiguous either/or takings test, demonstrates the fallacy of the argument that governmental entities are insulated from the just compensation mandate simply because their land use regulations are valid exercises of the police power.

II

MUGLER DOES NOT STAND FOR THE PROPOSITION THAT THERE IS A "PUBLIC HARM" OR "NUISANCE" EXCEPTION TO THE JUST COMPENSATION CLAUSE WHEN A REGULATION RESULTS IN THE DEPRIVATION OF ALL ECONOMICALLY VIABLE USE

The court below cites five United States Supreme Court cases in support of the proposition that there is a "nuisance" exception to the Just Compensation Clause which applies even when there is a complete deprivation of economically viable use: *Mugler v. State of Kansas*, 123 U.S. 623 (1887), *Hadacheck v. Sebastian*, 239 U.S. 394 (1915),

Miller v. Schoene, 276 U.S. 272 (1928), *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), and *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987).

There are several reasons, however, why the lower court's reliance on these five cases is misplaced. First, *Mugler* could not have created an exception to the Just Compensation Clause because the United States Supreme Court had not yet recognized the possibility of a regulatory taking. Second, none of these cases involved the complete deprivation of economically viable use.

A. Mugler Was Decided Before Regulatory Takings Were Recognized

Mugler involved a challenge to a Kansas statute which prohibited the manufacture and sale of intoxicating liquors. The property owners contended that their respective breweries would, in light of the statute, be of little or no value if not employed in the manufacture of beer. In concluding that the state's restriction on the permissible uses of the plaintiffs' breweries did not constitute a taking, the *Mugler* Court pointed out that the liquor prohibition was a legitimate police power objective:

> "[I]t is difficult to perceive any ground for the judiciary to declare that the prohibition by Kansas of the manufacture or sale, within her limits, of intoxicating liquors for general use there as a beverage, is not fairly adapted to the end of protecting the community against the evils which confessedly result from the excessive use of ardent spirits. . . . [W]e cannot shut out of view the fact, within the knowledge of all, that

> the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks." 123 U.S. at 661-62.

It is important to point out, however, that *Mugler* was decided more than 30 years before this Court recognized that a regulatory taking could occur when it decided the seminal case of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).[2] Because *Mugler* was issued before regulatory takings were even recognized, the Court was concerned only with the question of whether the regulation was a legitimate exercise of the state's police powers and not whether the property owner was deprived of economically viable use. That was the beginning, and the end, of the inquiry.

This point is illustrated by the *Mugler* Court's recognition that it was concerned, not with the Kansas regulation's economic impact on the property, but rather, with whether the regulation could survive substantive *due process* review:

> "These [eminent domain] principles have no application to the case under consideration. The question in *Pumpelly v. Green Bay Co.* arose under the State's power of eminent domain; while the question now before us arises under what are, *strictly*, the police powers of the State, exerted for the protection of the health, morals, and safety of the people." *Id.* at 668 (emphasis added).

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[2] As Justice Holmes emphasized in *Pennsylvania Coal*, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S. at 415.

Even if a state's regulation did not advance a legitimate police power, the *Mugler* Court pointed out that the Fourteenth Amendment's Due Process Clause, as opposed to the Fifth Amendment's Takings Clause, would be implicated:

> "[Police power legislation cannot] come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law." *Id.* at 669.[3]

This illustrates the inapplicability of *Mugler* to the facts of the present case, and to post-*Pennsylvania Coal* takings principles. It is, in a nutshell, impossible for *Mugler* to have created an exception to the requirement of just compensation for regulatory takings, because this Court had not yet recognized the rule that regulatory takings could occur, an issue which *Mugler* did not address.

B. This Court Has Never Insulated Governmental Entities from the Just Compensation Mandate when Property Owners Suffer a Complete Deprivation of Economically Viable Use

As noted above, the court below in no way questioned the factual finding that petitioner suffered a

---

[3] Today, of course, a regulatory *taking* under the Fifth Amendment may occur if the regulation does not substantially advance legitimate state objectives *or* results in the denial of all economically viable use. *See, e.g., Agins v. City of Tiburon*, 447 U.S. at 260.

complete deprivation of economically viable use as a result of the Beachfront Management Act. The court nevertheless insulated the South Carolina Coastal Council from the Fifth Amendment's just compensation requirement. A close analysis of the quintet of cases cited by the lower court reveals a complete dearth of precedent to support the proposition that the government may extinguish all economically viable use without the constitutional obligation to pay just compensation. The reason for this is quite simple: none of these cases involved the complete diminution of all economically viable use.

In *Mugler*, the plaintiffs did not contend, nor did this Court conclude, that no structures at all could be built or that there was in any way a complete deprivation of all economically viable use of land.

In *Hadacheck*, a city ordinance made it unlawful for any person to operate an establishment or factory for the manufacture or burning of brick within described geographical limits. The *Hadacheck* Court was thus not presented with a regulation of *all* economically viable use of property, because the plaintiff was free to construct residences or other types of manufacturing enterprises on the property. Moreover, *Hadacheck*, like *Mugler*, was decided prior to this Court's determination that regulatory takings were possible in the *Pennsylvania Coal* case.

In *Miller*, the State of Virginia ordered plaintiffs to cut down a large number of ornamental red cedar trees growing on their property as a means of preventing the communication of a rust or plant disease, with which they were infected, to the apple orchards in the vicinity. Plaintiffs were, however, entitled to use the felled trees

and to make any other economically viable use of property with the sole exception being the continued growth of red cedar trees.

It should also be noted that the plaintiffs did not even allege a Fifth Amendment taking in *Miller*, only a due process challenge. *Miller* cannot, therefore, be cited as a Fifth Amendment Takings Clause precedent.

In *Goldblatt*, the Town of Hempstead enacted an ordinance regulating dredging and pit excavating on property within its limits. Plaintiffs failed, however, to provide evidence "which even remotely suggests that prohibition of further mining will reduce the value of the lot in question." 369 U.S. at 594. The *Goldblatt* Court was thus not faced with the question whether the dredging regulation could have been insulated from the Fifth Amendment's just compensation mandate, even if the regulation had deprived the property owner of all economically viable use.

Finally, in *Keystone*, the State of Pennsylvania had enacted a Subsidence Act which was designed to prohibit mining that causes subsidence damage to certain categories of structures. In concluding that the Subsidence Act did not result in the taking of plaintiffs' property, the Court pointed out that the plaintiffs had "failed to make a showing of diminution of value sufficient to satisfy the test set forth in Pennsylvania Coal and our other regulatory takings cases." 480 U.S. at 492-93.

This Court has simply never held that a police power regulation which precludes all economically viable use may in certain circumstances be insulated from the Fifth

Amendment's just compensation mandate. As noted by Chief Justice Rehnquist in his *Keystone* dissent:

> "[O]ur cases have *never applied the nuisance exception to allow complete extinction of the value of a parcel of property.* Though nuisance regulations have been sustained despite a substantial reduction in value, *we have not accepted the proposition that the State may completely extinguish a property interest or prohibit all use without providing compensation.*" 480 U.S. at 513 (Rehnquist, C.J., dissenting) (emphasis added).

Under Chief Justice Rehnquist's analysis of the facts in *Keystone*, the Subsidence Act *did* "completely destroy" the plaintiff's coal deposits. As such, the Chief Justice found a taking requiring just compensation because "[a]pplication of the nuisance exception in these circumstances would allow the State not merely to forbid one 'particular use' of property with many uses [as in *Mugler* and its progeny] but to extinguish *all* beneficial use of petitioner's property." 480 U.S. at 514 (Rehnquist, C.J., dissenting) (emphasis in original).

Because the Court of Common Pleas in the present action made a specific factual determination that the setback lines deprived respondent Lucas of "any reasonable economic use of the lots," and rendered the lots "valueless," the five United States Supreme Court cases cited by the Coastal Council, which all involve only *partial* diminution in value, are irrelevant.

III

THE OPINION BELOW DIRECTLY CONFLICTS WITH A RECENT NINTH CIRCUIT OPINION WHEREIN THE COURT REFUSED TO INSULATE THE GOVERNMENT FROM A JUST COMPENSATION CLAIM, EVEN THOUGH THE PROPERTY OWNER WAS PURPORTEDLY ENGAGING IN A PUBLIC NUISANCE

The Ninth Circuit has recently issued an opinion which directly conflicts with the opinion of the court below. In *McDougal v. County of Imperial*, ___ F.2d ___, 1991 WL 156897 (9th Cir. 1991), the Court of Appeals refused to insulate the government from a just compensation claim, even though the property owner's water business was purportedly contributing to a public nuisance.

The governmental entity in *McDougal* designated the plaintiffs' property a "floodway," which allegedly rendered it valueless. In defending a Fifth Amendment just compensation claim, the government argued that no taking occurred because the floodway designation was necessary to abate a public nuisance. The Ninth Circuit disagreed:

> "We cannot agree that any legitimate purpose automatically trumps the deprivation of all economically viable use, such that whenever a regulation has a health or safety purpose, no compensation is required even if the land owner is thereby denied all use of his property. . . . Instead, we believe that a court is required to consider the nature as well as the legitimacy of the state's interest together with the nature and extent of its impact on the owner's use of his land." *McDougal*, 1991 WL 156897 at 27-28.

The court below, in refusing to consider the economic impact of the Beachfront Management Act, has created a precedent directly at odds with the Ninth Circuit's opinion in *McDougal* and, as explained above, the precedents of this Court.

IV

EVEN IF THERE IS A NUISANCE EXCEPTION TO THE JUST COMPENSATION CLAUSE, THE CONSTRUCTION OF A HOUSE IS NOT A NOXIOUS USE OF PROPERTY

Even if it is assumed that there is a "public harm" or "nuisance" exception to the Fifth Amendment's Just Compensation Clause, the construction of a house is not even remotely a noxious use of property. The Beachfront Management Act, which is quoted extensively in the opinion below, speaks primarily of the need to protect the South Carolina coastline from erosion. It does not, and could not, justify the outright prohibition of structures as somehow constituting a "noxious" use of property on par with the maintenance of a distillery in *Mugler* and an urban brickyard in *Hadacheck*. As recently explained by the dissent in *Esposito v. South Carolina Coastal Council*, 939 F.2d 165 (4th Cir. 1991):

> "The rapidity with which rental beach houses are gobbled up by the public causes me to doubt that they are, at least yet, generally regarded as 'tantamount to a public nuisance.' . . . [T]he Act's gradual forty-year retreat scheme, rather than immediate destruction of all offending structures, is clear proof that the *Esposito* claimants' residences are not dire threats to public safety and welfare. A 'public nuisance' ought to

> be abated, not phased out through a half-lifetime of attrition." *Id.* at 173 n.2.

The Beachfront Management Act's conclusory references to the protection of "life and liberty," language which can be made part and parcel of practically any governmental enactment, cannot survive Fifth Amendment scrutiny. As this Court pointed out in *Nollan v. California Coastal Commission*, 483 U.S. 825, "[w]e view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination." *Id.* at 841.

CONCLUSION

The dissent in the opinion below rightly bemoaned the fact that takings law "is an area of considerable confusion." *Lucas*, 404 S.E.2d at 903. In an era of increasingly complex and pervasive environmental regulations, many of which contain no provisions whatsoever for just compensation, this Court should take steps to ensure the preeminence of the United States Constitution. As laudable as environmental regulations may purport to be, it must still be recognized that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Company v. Mahon*, 620 U.S. at 416.

For the reasons stated above, amicus respectfully requests that this Court grant the petition for certiorari.

DATED: October, 1991.

Respectfully submitted,

RONALD A. ZUMBRUN
*EDWARD J. CONNOR, Jr.
*Counsel of Record
TIMOTHY V. KASSOUNI
Pacific Legal Foundation
2700 Gateway Oaks Drive,
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amicus Curiae,
Pacific Legal Foundation

(9)

No. 91-453

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In The

Supreme Court of the United States

October Term, 1991

DAVID H. LUCAS,

Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of South Carolina

JOINT APPENDIX

A. CAMDEN LEWIS
Counsel of Record
LEWIS, BABCOCK & HAWKINS
1513 Hampton Street
P.O.Box 11208
Columbia, South Carolina 29211
(803) 771-8000

GERALD M. FINKEL
Attorney for Petitioner
FINKEL, GOLDBERG, SHEFTMAN & ALTMAN
P.O. Box 1799
Columbia, South Carolina 29202

DAVID J. BEDERMAN
Of Counsel
Emory University School of Law
Gambrell Hall
Atlanta, Georgia 30322

C.C. HARNESS, III
Counsel for Respondent
South Carolina Coastal Council
4130 Faber Place, Suite 300
Charleston, South Carolina 29405
(803) 744-5838

Petition For Writ Of Certiorari Filed September 13, 1991
Certiorari Granted November 18, 1991

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DAVID H. LUCAS v.
SOUTH CAROLINA COASTAL COUNCIL

RELEVANT DOCKET ENTRIES

Complaint 1/05/89

Amended Answer 6/22/89

South Carolina Circuit Court Hearing 8/07/89

Decision of South Carolina Circuit Court 8/10/89

Decision of South Carolina Supreme Court 2/11/91

Denial of Petition for Rehearing South Carolina Supreme Court 6/17/91

Petition for Writ of Certiorari 9/13/91

STIPULATIONS FROM SOUTH CAROLINA CIRCUIT COURT HEARING (PAGES SOUTH CAROLINA SUPREME COURT TR. 12, 13, 14)

* * *

The Plaintiff and Defendant in the above referenced matter stipulate to the following facts:

1. Don Pardue, MAI, the expert appraiser for the Plaintiff is an expert qualified to testify concerning the values of the subject property.

2. Chris Donato, MAI, the expert appraiser for the Defendant is an expert qualified to testify concerning the values of the subject property.

3. David Stevens, Wando Engineering, is an engineer qualified to assist in the preparation of maps and plats of the property in question.

4. Chris Jones, Coastal Science and Engineering, is a coastal engineer who is an expert qualified to testify about shoreline processes and beachfront management.

5. The shorelines depicted on the Plaintiff's plats and on Defendant's exhibits are accurate and that the baseline and 20 foot no construction line stated on Plaintiff's and Defendant's exhibits is an accurate depiction.

6. For the sake of argument of this case, both parties agree that while the base line and 20 foot no construction line currently are interim lines, that for purposes of the case that they are permanent lines which will not be moved landward or seaward before 1990.

7. All photographs are entered into the record without objection.

8. The following documents are entered into evidence without objection:

9. There is no erosion control device in front of Lot 24. A revetment exists partially on Lot 23 and is part of a continuous revetment which continues to the south of this lot.

10. Under current law, the Plaintiff can build a walkway to the beach without a permit and a small deck. The Council will not prevent the use of this lot for location of temporary structures such as trailers or tents.

11. The current law prevents construction of any habitable structures or recreational amenities on the subject lots.

12. The beach is primarily effected by the effects of Dewees Inlet and is generally accretional at a rate of 2.4 feet per year. However, erosion does occur at the beach in question.

13. The subject lots have houses on either side of them.

14. The appropriate methodology used for this stretch of beach is that of an unstabilized inlet zone pursuant to Section 48-39-280. This methodology sets the baseline at the most landward position of the shoreline during the past forty years and is depicted on both the Plaintiff's and Defendant's exhibits. Both the baseline and 20 foot no construction line at entirely landward of the two lots.

15. The intended use for Lot 22 and 24 is for construction of single-family homes.

16. The South Carolina Coastal Council agrees that any application for a permit to build would have been denied, however, it reserves as an argument

concerning temporary damages that no permit has been applied for by Plaintiff.

* * *

EXCERPTS FROM TESTIMONY OF CHRISTOPHER JONES (PAGES SOUTH CAROLINA SUPREME COURT TR. 70, 71)

* * *

Q. All right, sir. Now, I ask you if you can identify Exhibit Number 30 – Defendant's Exhibit Number 39 and tell me what this demonstrates?

A. Those are 1988 aerial photographs flown on July first and second of 1988 for the Coastal Council, showing the area in question, Beechwood East, and Dunecrest Lane further to the right.

There are two lines drawn across the drawing. The seaward most of the lines is the base line. The landward most twenty feet further back is the no-construction line and setback line.

Q. Can you come down with a pencil and just mark for the Judge – point to where the lines are and then show me where the Lucas lots are? This will probably look a lot better. Let's give you that.

A. This first line is the base line. The second one is the setback line. The Lucas lots are here, Lot 22 and then Lot 24. Lot 23 is the house we discussed previously.

Q. Can you basically tell me what methodology was used in order to determine the location of these lines?

A. These lines were established last fall. It's actually the second generation of interim lines at the site. They were established thinking that the base line was the most landward point of erosion or the most landward location of the shoreline over the last forty years.

In this area the baseline was set along a 1963 vegetation line. I'm not saying mean high water line. I'm talking about the scarp line which separates the uplands from the beach on eroding property. The property was eroding at that point in time and we were left with a distinct line.

Q. That's how the baseline was drawn?

A. Right.

Q. Now, the second line behind the baseline is designated as what?

A. It's actually two lines on top of each other. The twenty foot no-construction line and the forty year setback line.

This is an area which has been considered over the long term to be accretional, and as such the setback line is a minimum twenty foot setback.

* * *

EXCERPTS FROM TESTIMONY OF STEVEN MOORE (PAGES SOUTH CAROLINA SUPREME COURT TR. 108, 109)

* * *

Q. Mr. Moore, you know good and well that if Dave Lucas came in and asked to go out on the front beach and scrape sand to put on his lots you wouldn't do it. Isn't that correct?

A. No, I can't say that.

Q. Not the Isle of Palms, but Dave Lucas.

A. I don't know. I really don't. It would depend on the circumstances of the application.

Q. And after July 1, 1988, had Mr. Lucas come in to you as permit administrator for the South Carolina Coastal Council and applied for a permit to build a house on Lot – on Lot 24 or Lot 22, you would have denied it?

A. That's correct.

Q. Isn't that correct?

A. That's correct.

Q. And as far as his ability to put a tent or mobile home or trailer on Lots 22 and 24, it would be okay with you, is my understanding. Is that correct?

A. That's correct.

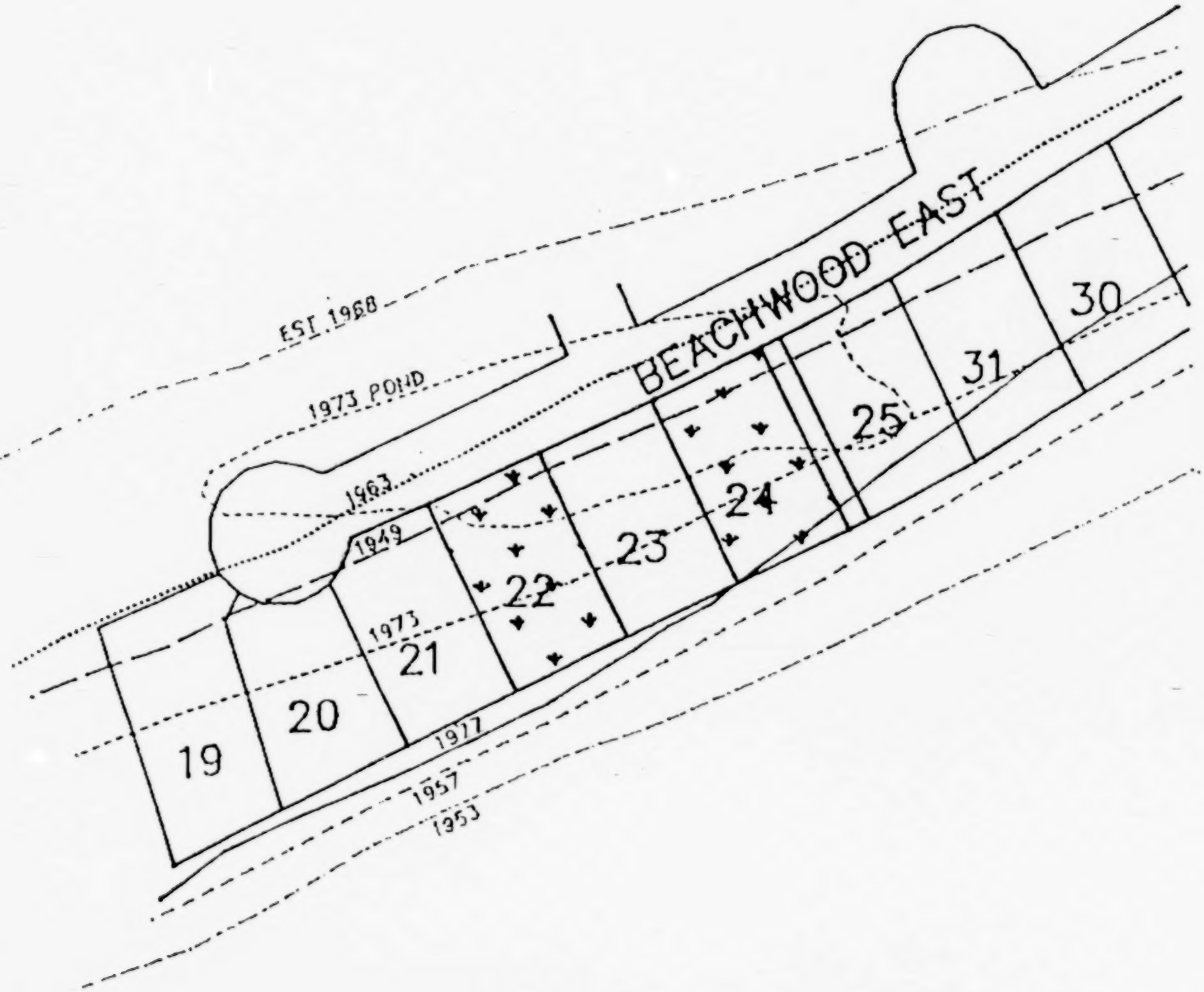
Q. But you don't know what Wild Dunes Association out there would allow, do you?

A. No, I don't.

Q. One final question. As of July 1, 1988, wouldn't you agree that there was a substantial beach in front of Lots 22 and 24?

A. Yes.

* * *



DEFENDANT/RESPONDENT'S EXHIBIT 22 FROM
SOUTH CAROLINA CIRCUIT COURT HEARING

(7)

No. 91-453

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In The

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October Term, 1991

DAVID H. LUCAS,

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SOUTH CAROLINA COASTAL COUNCIL,

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On Writ Of Certiorari
To The Supreme Court
Of The State Of South Carolina

PETITIONER'S BRIEF ON THE MERITS

A. CAMDEN LEWIS
Counsel of Record
LEWIS, BABCOCK & HAWKINS
1513 Hampton Street
P.O. Box 11208
Columbia, South Carolina 29211
(803) 771-8000

GERALD M. FINKEL
Attorney for Petitioner
FINKEL, GOLDBERG, SHEFTMAN & ALTMAN
P.O. Box 1799
Columbia, South Carolina 29202

DAVID J. BEDERMAN
Of Counsel
Emory University School of Law
Gambrell Hall
Atlanta, Georgia 30322

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OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Does a land-use regulation, pursuant to a state's police power, require compensation under the Constitution's Fifth Amendment if it totally eliminates the value of private property?

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PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion and judgment of the South Carolina Supreme Court dated February 11, 1991, including the dissenting opinion of Justice Harwell (concurred in by Justice Chandler), is reported at 404 S.E.2d 895 (S.C. 1991), and is reprinted in the Appendix to the Petition for Certiorari ("Pet. App."), at 1.

The South Carolina Supreme Court's denial of Petitioner's Petition for Rehearing dated June 17, 1991, has not yet been reported, and is reprinted in Pet. App. at 32.

The opinion and judgment of the Court of Common Pleas, Charleston County, Special Judge Patterson presiding, filed August 14, 1989, was not reported, and is reprinted in Pet. App. at 33.

STATEMENT OF JURISDICTION

Petitioner has been granted review from the opinion and judgment of the South Carolina Supreme Court of February 11, 1991. This Court granted the Petition for Certiorari on November 18, 1991. *Lucas v. South Carolina Coastal Council*, No. 91-453 (Petition for Certiorari granted) (Nov. 18, 1991). The Supreme Court has jurisdiction to review cases from state courts by virtue of 28 U.S.C. § 1257(a) (1988).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part that "private property [shall not] be taken for public use without just compensation."

The South Carolina Beachfront Management Act, 1988 Act No. 634, S.C. CODE ANN. § 48-39-10 *et seq.* (Supp. 1990), as amended by 1990 Act No. 607, is set forth in Pet. App. at 42.

STATEMENT OF THE CASE

A. David Lucas's Property.

In December 1986, the Petitioner, David H. Lucas, purchased two lots on the Isle of Palms, Charleston County, South Carolina. *Lucas v. South Carolina Coastal Council*, Order filed Aug. 14, 1989 (Court of Common Pleas), at 1, *reprinted at* Pet. App. 33 [hereinafter "Common Pleas Order"]. He paid $975,000 for both pieces of property, which were zoned single-family residential. *Id.* at 1, Pet. App. 33. Lucas intended to build a house on each property, one for his own family and one for resale. *Id.* At the time Mr. Lucas purchased the parcels, there were no state, county, or municipal regulations which would have hindered him in constructing the planned homes. *Id.* at 1, Pet. App. 33-34.

The two parcels were separated by an intervening lot, upon which a home had already been built in the early 1980s. *Id.* at 4, Pet. App. 36. There were also homes on the other side of each lot. Mr. Lucas's property line is situated at approximately 300 feet from the ocean, as measured from the mean high-water mark. *Id.* There have been only occasional occurrences of beach erosion in the vicinity of the Lucas properties, and none after 1983. *Id.* at 5, Pet. App. 37.

B. The South Carolina Beachfront Management Act.

On July 1, 1988, South Carolina's Beachfront Management Act, S.C. CODE ANN. § 48-39-250 *et seq.* (Supp. 1990), came into force [hereinafter "the Act" or "1988 Act" or, if

context permits, "the regulation"]. The Act spells out the South Carolina legislature's findings and intent in some detail, but it is also important to know that the Beachfront Management Act was intended to supplement an earlier statutory enactment on Coastal Zone Management, 1977 Act No. 123, *codified at* S.C. CODE ANN. § 48-39-10 *et seq.* (1987) [hereinafter "1977 Act"]. The 1977 Act was manifestly intended to indicate South Carolina's participation in the federal Coastal Zone Management Act programs. *See id.* §§ 7(C) & 8, *codified at* S.C. CODE ANN. §§ 48-39-20(C) & 48-39-80 (1987); *see also,* Coastal Zone Management Act of 1972, 16 U.S.C. § 1451 *et seq.* (1988). The 1977 Act also created the South Carolina Coastal Council, the Respondent in this Case [hereinafter referred to as "Council"], and charged it with substantive duties. 1977 Act No. 123 at §§ 4 & 5, *codified at* S.C. CODE ANN. §§ 48-39-40 & 48-39-50 (1987).[1]

The 1977 Act limited new development in the "critical areas" of the coastal zone, except for that building authorized by permits issued by the Council. *Id.* § 13, *codified at* S.C. CODE ANN. § 48-39-130 (1987). This "critical area" was defined to include "(1) coastal waters, (2) tidelands, (3) beaches and (4) primary ocean front sand dunes." *Id.* § 3(J), *codified at* S.C. CODE ANN. § 48-39-10(J) (1987). Because the 1977 Act restricted only new development in that area beyond the "front row of dunes adjacent to the Atlantic Ocean," *id.* § 3(I), *codified at* S.C. CODE

[1] The composition and powers of the South Carolina Coastal Council were later altered in amendments adopted in 1990, 1990 Act No. 607, §§ 6 & 8, *codified at* S.C. CODE ANN. §§ 48-39-40 & 48-39-50 (Supp. 1990).

ANN. § 48-39-10(I) (1987), it did not affect the lots that David Lucas would later purchase in 1986.[2] The 1977 Act also indicated that such regulations under the Act should not be so "unduly restrictive so as to constitute a taking of property without the payment of just compensation in violation of the Constitution of [South Carolina] or of the United States." 1977 Act § 2(C), *codified at* S.C. CODE ANN. § 48-39-30(C) (1987).

The 1988 Beachfront Management Act extended the "critical areas" protected from new development to a zone drawn from the mean high-water mark of the ocean to a setback line established by the Council. 1988 Act, at § 4, *codified at* S.C. CODE ANN. § 48-39-10(J) (Supp. 1990). The Beachfront Management Act expressly stated that the beach/dune system along the South Carolina coast was important for "provid[ing] the basis for a tourism industry," for "provid[ing] a habitat for numerous species of plants and animals," for "protect[ing] life and property by serving as a storm barrier and . . . contribut[ing] to shoreline stability in an economical and effective manner," as well as "provid[ing] a natural healthy environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well-being." 1990 Amendments to Beachfront Management Act, 1990 Act No. 607, § 1(1), *codified at* S.C. CODE ANN. § 48-39-250(1) (Supp. 1990) [hereinafter "1990 Amendments"].

The South Carolina legislature sought, therefore, to "discourag[e] new construction in close proximity to the

[2] Common Pleas Order at 1, Pet. App. 33-34.

beach/dune system and encourag[e] those who have erected structures too close to the system to retreat from it." *Id.* § 1(6), *codified at* S.C. CODE ANN. § 48-39-250(6) (Supp. 1990). The Council was then charged with implementing a forty-year retreat policy by drawing setback lines along the coast. 1988 Act, § 3, *codified at* S.C. CODE ANN. § 48-39-280 (Supp. 1990). The setback line was drawn at a distance of forty (40) times the average annual erosion rate, as measured from the top of the primary sand dune at the beach. *Id.* § 3(B), *codified at* S.C. CODE ANN. § 48-39-280(B) (Supp. 1990).[3]

According to the Act, no new construction or reconstruction is allowed seaward of the setback line. *Id.* § 1(A), *codified at* S.C. CODE ANN. § 48-39-290(A) (Supp. 1990). The one exception to this dictate is the construction of a "wooden walkway no larger in width than six feet." *Id.* § 1(A)(1), *codified at* S.C. CODE ANN. § 48-39-290(A)(1) (Supp. 1990). Other kinds of amenities may be constructed beyond the setback line (including wooden decks, public fishing piers, structures which enhance

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[3] In other words, if the average erosion rate for a part of the coast was ten (10) feet per year, then the setback line would be drawn at a distance of 400 feet from the top of the primary sand dune. At a minimum, the setback line had to be drawn at least twenty (20) feet from the top of the dune. 1988 Act, § 3(B), *codified at* S.C. CODE ANN. § 48-39-280(B) (Supp. 1990).

In Mr. Lucas's case, the Council drew a twenty-foot setback *not* from the primary sand dune, but along a 1963 vegetation line that was located along a road servicing the subdivision. Historically, the beach has been accreting rather than eroding where Mr. Lucas's lots are located. South Carolina Supreme Court Transcript [Tr.] at 70-71, J.A. 5-6. Lucas did not challenge the manner in which the setback line was drawn.

access, golf courses, and swimming pools), provided that a permit is granted by the Council. *Id.* § 1(A), *codified at* S.C. CODE ANN. § 48-39-290(A) and (C)(3) (Supp. 1990).

In addition to amplifying the legislature's intent in passing the law, as discussed above, the 1990 Amendments sought to provide procedural remedies previously unavailable to property owners affected by the Act. The 1990 Amendments allowed an aggrieved property owner to seek a special permit from the Council in order to build or rebuild a structure seaward of the baseline. 1990 Amendments, § 3, *codified at* S.C. CODE ANN. § 48-39-290(D)(1) (Supp. 1990). A special permit may not be granted where the planned construction is on a primary oceanfront sand dune or on the active beach. Moreover, a property owner in applying for a special permit covenants to remove the offending structure if the Council so orders because it is "detrimental to the public health, safety or welfare." *Id.* The 1990 Amendments also established the standard of judicial review for Council actions challenged in South Carolina courts. The legislature provided that the

> "court shall determine whether the prohibition so restricts the use of property as to deprive the owner of the practical uses of it and is an unreasonable exercise of the police power and constitutes a taking without compensation. The burden of proof is on the petitioner as to ownership, and the burden of proof is on the State to prove that the prohibition is not an unreasonable exercise of police power."

Id. § 3, *codified at* S.C. CODE ANN. § 48-39-305(A) (Supp. 1990).

C. Judicial Proceedings.

After the passage of the Beachfront Management Act in 1988, the Council drew a setback line behind Lucas's properties, thus precluding him from constructing residential buildings and other permanent structures thereupon. It was apparent that the Council would not alter the lines or issue a special permit, even if such a variance had been available under the 1988 Act. Tr. at 108-109, J.A. 7-8. Lucas filed an action in the Court of Common Pleas, Charleston County, claiming that the Act so restricted his ownership rights that it amounted to a taking of his property without just compensation in violation of both the South Carolina and United States Constitutions. *See Lucas v. South Carolina Coastal Council,* (Complaint filed Jan. 5, 1989), at ¶ 11; *reprinted at* Pet. App. 153, at 156.

The trial court, Patterson, J., presiding, found that the Act had worked a permanent and total loss in the value of Lucas's property. Common Pleas Order, at 5, *reprinted at* Pet. App. 37. The trial court found that "the prohibition on construction imposed on the[] two lots is permanent" and that the Council had stipulated that the setback lines are "final . . . and will not be moved." *Id.* Judge Patterson also found that "the imposition of building restrictions . . . imposed by the South Carolina Coastal Council deprives Lucas of any reasonable economic use of the lots, has eliminated the unrestricted right of use, and renders them valueless." *Id.* The trial court awarded Lucas $1,232,387.50 in compensation. *Id.* at 8, Pet. App. 40. Judge Patterson concluded his Order by noting that "since the State has totally acquired Lucas's property, it is entitled to a deed to the property free and clear of any

incumbrances," once the State had paid the just compensation stipulated. *Id.*

The Council appealed. The South Carolina Supreme Court reversed, holding that the Act did not work a taking requiring compensation under either the state or federal constitutions. *Lucas v. South Carolina Coastal Council,* 404 S.E.2d 895, 898-902 (S.C. 1991). In the majority opinion, the supreme court examined the Beachfront Management Act and said:

> "As applied to the two Lucas lots, the Act prohibits, through statutorily mandated setback lines, the construction of any permanent structure (including a dwelling), save a small deck or walkway."

Id. at 896.

On June 17, 1991, the South Carolina Supreme Court rejected Lucas's Petition for Rehearing. A Petition for Certiorari from the Supreme Court of South Carolina was filed in this Court on September 13, 1991. The Petition was granted on November 18, 1991.

SUMMARY OF THE ARGUMENT

This case invites the Court to revisit regulatory takings law. The South Carolina Supreme Court has repudiated the recent jurisprudence of this Court by converting a complex inquiry into a bright-line test which ignores private interests in property affected by state regulation. In holding that the South Carolina Beachfront Management Act does not effect a regulatory taking of Petitioner's coastal property, the South Carolina Supreme

Court ruled that the state need only prove that it is acting pursuant to its legitimate police powers in order to evade the constitutional duty of just compensation. This ruling is contrary to the recent holdings of this Court and is utterly subversive of takings jurisprudence.

This case does not involve the physical occupation by the State of private property. Nor does this case touch upon the quantum or modalities of "just compensation." Finally, Petitioner does not seek to challenge the public wisdom of the South Carolina Act. The South Carolina Supreme Court improperly chose to view Petitioner's position on this last issue as conceding not only the rightful exercise of the state's police power for land-use regulation, but also as an admission that Petitioner's intended use of his land amounted to a nuisance. *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 898, 900 (S.C. 1991).

Petitioner first submits that the so-called "nuisance exception" to the Takings Guarantee has been broadly misunderstood. Developed as a corollary to challenges of regulation based only on due process grounds, it has no place in the modern jurisprudence which views extreme forms of regulatory takings as violative of the Just Compensation clause of the Fifth Amendment. The categorical nature of the nuisance exception – which would deny compensation whenever a legislature finds that a certain activity poses a public hazard – cannot be reconciled with the approach taken by this Court in "as applied" challenges of regulatory takings since at least 1922.

Should this Court decide that some vestige of a nuisance exception exists, Petitioner next submits that it

must be doctrinally limited. In cases where the value of property is totally taken by regulation, a court's denial of just compensation cannot be justified either in judicial precedent or sound public policy. It is undisputed in this case that the entire value of Mr. Lucas's two coastal lots was taken by operation of the South Carolina law.

Finally, not all exercises of a state's police power are directed against nuisances, and the Petitioner maintains that his desire to build private residences on beachfront property is not a nuisance that would legitimize a state regulation having the effect of depriving him of all use of his property. There must be an objective standard by which legislatures identify nuisances, and thus regulate away the value of property without compensation. Otherwise, the states' broad police powers could insulate *all* land-use regulations from challenges under the Takings Guarantee.

ARGUMENT

I. THE CONSTITUTION'S TAKINGS GUARANTEE SHOULD NOT BE QUALIFIED BY AN EXCEPTION FOR NUISANCES.

The fundamental premise of the judgment of the South Carolina Supreme Court, on review here, is that David Lucas by conceding that the Beachfront Management Act was a valid exercise of the state's police power also admitted that his planned use of his property was a nuisance, and that he was thus not entitled to just compensation under the Constitution's Fifth Amendment. *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 898,

900 (S.C. 1991). The critical problem with the South Carolina Supreme Court's application of a nuisance exception is that it simply short-circuits any attempt to balance private rights and public interests. Allowing a legislature to qualify a land-use activity as a nuisance, and thus deny compensation, subverts the Fifth Amendment's command that "private property [shall not] be taken for public use without just compensation." U.S. CONST., amend. V.

A. In Cases of Regulatory Takings by States, Any Nuisance Exception Was Intended to Qualify the Due Process Clause of the Fourteenth Amendment, Not the Takings Guarantee.

The South Carolina Supreme Court relied on a short line of cases which have been argued for the proposition that a regulatory taking of property need not be compensated when the regulation "exists to prevent serious public harm." *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 899 (S.C. 1991). This line of authority includes *Mugler v. Kansas*, 123 U.S. 623 (1887); *Reinman v. Little Rock*, 237 U.S. 171 (1915); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Miller v. Schoene*, 276 U.S. 272 (1928); and *Goldblatt v. Hempstead*, 369 U.S. 590 (1962).

Each of these cases will be reviewed in some detail elsewhere in this brief, but it is important to indicate here that at the time the first three of these cases were decided, the concept of a taking of property *by regulation* had not actually been recognized. Until this Court's decision in *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922), a property-owner's claim that a federal or state regulation had diminished the value of land did not merit treatment

under the Fifth Amendment's takings guarantee. Such claims fell rather under the due process clause of the Fifth Amendment (if against the federal government) or the due process clause of the Fourteenth Amendment (as against the states). *See, e.g., Reinman v. Little Rock*, 237 U.S. 171, 176 (1915) (a regulation will be upheld when the state's police power "is not exerted arbitrarily, or with unjust discrimination, so as to infringe upon rights guaranteed by the Fourteenth Amendment."). Such analysis required only that the regulation be rationally related to the "protection of the health, morals, and safety of the people." *Mugler v. Kansas*, 123 U.S. at 668. As this Court in *Mugler* clearly indicated

> "[Police power legislation cannot] come within the Fourteenth Amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property, without due process of law."

Id. at 669.

The *Mugler* case confirmed that regulatory takings of property would be reviewed only under the standard of substantive due process then prevalent in 1887.[4] Prior to *Lochner v. New York*, 198 U.S. 45, 53 (1905), the notion of a state's police power was as expansive in 1887 as it is

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[4] For some of the scholarly literature on this point, *see* Connors, *Back to the Future: The "Nuisance Exception" to the Compensation Clause*, 19 CAP. U. L. REV. 139, 150-51 (1990); Reznick, *Land Use Regulation and the Concept of Takings in Nineteenth Century America*, 40 U. CHI. L. REV. 854, 869 (1973); Sax, *Takings and the Police Power*, 74 YALE L. J. 36, 57 (1964).

today. *See, e.g., Barbier v. Connolly,* 113 U.S. 27, 31 (1885) (upholding law prohibiting operation of laundry at night); *Railroad Co. v. Richmond,* 96 U.S. 521, 529 (1877) ("[a]ll property within the city is subject to the legitimate control of the government. . . . Appropriate regulation of the use of property is not 'taking' property, within the meaning of the constitutional prohibition."). In effect, there was no "nuisance exception" at all during the *Mugler* era. The only way a land-use regulation could be struck down was by proving that it was not a legitimate exercise of the police power and thus did not further a legitimate state interest. *See Curtin v. Benson,* 222 U.S. 78, 86 (1911); *Lawton v. Steele,* 152 U.S. 133, 137 (1894).

B. A Categorical Nuisance Exception Flatly Contradicts the Court's Modern Regulatory Takings Jurisprudence.

This Court's decision in *Pennsylvania Coal v. Mahon,* 260 U.S. 393 (1922), along with its antecedent, *Block v. Hirsh,* 256 U.S. 135 (1921), revolutionized this area of law. Justice Holmes's opinion in *Pennsylvania Coal* is justly famous for its statement that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." 260 U.S. at 415. *Pennsylvania Coal* was the first case in which this Court invalidated a land-use regulation as violative of the Takings Guarantee, because it substantially diminished the value of private property. *Id.* at 413. In the earlier decision of *Block v. Hirsh,* the Court upheld a regulation (an early form of rent control) by ruling that it did *not* go too far in diminishing the value of private property. 256 U.S. at 154-56.

Although this Court has applied a variety of tests to determine if just compensation is due under the Fifth Amendment, it has remained true to the *Pennsylvania Coal* principle that private rights cannot be ignored, even in the face of legitimate state interests in regulating the use of land. As this Court has recently indicated, the Takings Guarantee was designed "not to limit the governmental interference with property rights *per se,* but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304, 315 (1987) (original emphasis). In short, examining the public interest in regulation carries the court across only one of the hurdles erected by the Fifth Amendment, which *presumes* that a taking is "for public use." U.S. CONST., amend. V. The next hurdle is to ascertain the impact of the regulation on the individual property-owner.

Each of the legal tests developed by the Court to identify a regulatory taking honors both private rights and public interests. In *Penn Central Transportation Co. v. New York City,* 438 U.S. 104 (1978), the Court pointed to "several factors that have particular significance," including

> "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations. . . . [Also relevant] is the character of the governmental action."

Id. at 124 (citations omitted). Refining the *Penn Central* factors, this Court said in *Agins v. Tiburon,* 447 U.S. 255

(1980), that a land-use regulation may effect a taking if it does not "substantially advance legitimate state interests" *or* if it "denies an owner economically viable use of his land." *Id.* at 260. Seven years later, the Court reaffirmed this formulation: "We have long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.' " *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987) (quoting *Agins*, 447 U.S. at 260). *See also Hodel v. Virginia Surface Mining and Reclamation Ass'n, Inc.*, 452 U.S. 264, 295-96 (1981) ("A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land' . . . ").

In later pronouncements, the Court has indicated that the two-part *Agins* test should be used only in facial challenges of regulations, while the three-prong *Penn Central* factors should be reserved for cases in which a regulation is challenged as applied to a certain parcel of land (as is true here). *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987); *Hodel*, 452 U.S. at 295. Nevertheless, the clear import of both standards is that it is not enough for a state to show that a legitimate exercise of police power supports the regulation. In addition, the precise character of the regulation needs to be examined, and it must also be shown that the regulation did not severely prejudice the economic interests of the property-owner, particularly investment-backed expectations.

The South Carolina Supreme Court's opinion made clear that it made no difference *how much* the Petitioner's ownership interest in his coastal property was affected by

the 1988 Act. Relying on language from this Court's decision in *Keystone*, the South Carolina Supreme Court ruled that Lucas's purported concession (that his planned construction of a home was a nuisance) sufficed to establish an exception to the Constitution's Takings Guarantee. *Lucas*, 404 S.E.2d at 900-01. The South Carolina Supreme Court read Keystone as overruling both *Agins* and *Penn Central* (and their progeny) to the extent that they required that the owner's economic interests in property be assessed in light of the value lost as a result of the regulation. *Id.* Curiously, the South Carolina Supreme Court characterized Lucas's position, in urging the application of the *Penn Central* factors, as extremist. It would, that court said, make "*wholly* irrelevant" the question of the state's legitimate exercise of its police powers. *Id.* at 900 (original emphasis).

Keystone cannot be intelligibly understood to mean that the factors articulated in *Penn Central* are to be jettisoned in "as applied" challenges of regulatory takings. *Keystone*, after all, implicated a *facial* challenge of the Pennsylvania coal subsidence statute, the antecedent of which was the subject of Justice Holmes's opinion in *Pennsylvania Coal v. Mahon*. *See Keystone*, 480 U.S. at 478. This Court actually did employ the test articulated in *Agins*, which was appropriate to facial challenges of regulatory takings. This Court plainly decided that the state of Pennsylvania had a legitimate interest in enacting its law *and* that the claimant had failed to "make a showing of [sufficient] diminution of value. . . . " *Id.* at 492-93. This Court made clear that it was applying the *Agins* test, and not any categorical nuisance exception of *Mugler* and its descendants. *Id.* at 485.

Although the South Carolina Supreme Court interpreted the *Keystone* Court's review of the second *Agins* prong as surplusage, *Lucas*, 404 S.E.2d at 901 n.4, it seems clear that this Court was attempting in *Keystone* to reconcile the *Mugler* line of authority with the elements articulated in *Agins*, but only for the purpose of handling facial challenges. In such cases it would be difficult, if not impossible, for claimants to establish the "economic impact of the regulation" and its "interfere[nce] with distinct investment backed expectations." *Penn Central*, 438 U.S. at 124. One might infer from the Court's reasoning that the burden was on a claimant primarily to attack the regulation as an illegitimate exercise of a state's police power. In short, the Court in *Keystone* reconciled the *Mugler* line of authority by integrating it into the first prong of the *Agins* test: the assessment of the legitimate state interests implicated by the regulation.

Keystone clearly cannot be read to mean that a claimant whose property has already been affected by regulation has to prove *both* illegitimate state interest *and* substantial diminution of value. This would be to twist the language of the Fifth Amendment into a guarantee merely that just compensation will be paid for private property only where it is *not* taken for a public use. This is not what the Constitution says. To read *Keystone* in the fashion the South Carolina Supreme Court has suggested would mean that "as applied" challenges of regulatory takings would be adjudicated merely in accordance with due process and without regard to the Fifth Amendment. This would be to overrule *Pennsylvania Coal v. Mahon*, which established that regulations which go "too far," 260

U.S. at 415, are subject to just compensation under the Fifth Amendment.

Petitioner maintains that when regulatory takings are considered under the Just Compensation Clause of the Fifth Amendment, a categorical nuisance exception cannot be maintained. Petitioner agrees that it is conceivable that such an exception (which looks exclusively at the nature of government regulation) could be integrated into the *Agins* two-part test for facial challenges, as the court in *Keystone* suggested. It cannot, however, be reconciled with the rule for "as applied" challenges propounded in *Penn Central*, confirmed in *Nollan* and *Hodel*, and, ultimately, derivative from this Court's 1922 opinion in *Pennsylvania Coal*.

II. ANY NUISANCE EXCEPTION SHOULD NOT APPLY WHEN THE REGULATION ELIMINATES THE WORTH OF PROPERTY.

The rule that Petitioner proposes to this Court is that the enforcement of land-use regulations which have the effect of eliminating the value of private property should be *per se* subject to the just compensation requirement of the Fifth Amendment. The key defect in the South Carolina Supreme Court's decision was its complete indifference to the impact of the 1988 Act on Mr. Lucas's property. This case presents an undisputed occasion where the entire worth of a parcel was taken by regulation.

The South Carolina trial court expressly found that the entire value of Mr. Lucas's two lots was eliminated by the regulation. Judge Patterson found that the Act had

worked a permanent and total loss in the value of Lucas's property. Common Pleas Order, at 5, *reprinted at* Pet. App. 37. The trial court also found that "the prohibition on construction imposed on the[ ] two lots is permanent" and that the Council had stipulated that the setback lines are "final . . . and will not be moved." *Id.* Judge Patterson also found that "the imposition of building restrictions . . . imposed by the South Carolina Coastal Council deprives Lucas of any reasonable economic use of the lots, has eliminated the unrestricted right of use, and renders them valueless." *Id.* These findings were not disturbed by the South Carolina Supreme Court. In fact the Court found that the regulation prohibited any use save "a small deck or walkway." *See Lucas v. South Carolina Coastal Council,* 404 S.E.2d 895, 896, 901 (S.C. 1991).

When property is rendered valueless by regulation there is no basis either in precedent or public policy for allowing a state to evade its duty of just compensation under the Fifth Amendment.

A. A Nuisance Exception Has Never Been Applied in Cases Where the Value of Property Was Totally Eliminated by Regulation.

Even assuming that a nuisance exception to the Takings Guarantee is relevant to challenges of regulatory takings, there is no precedent for the proposition (asserted by the South Carolina Supreme Court) that just compensation can be denied in cases where the value of property was virtually eliminated by the application of the regulation. Looking first to the quintet of so-called

"nuisance exception" cases decided in this Court,[2] it is apparent that none featured a regulation which eliminated the value of the property as the South Carolina Act did in the case of Mr. Lucas's two coastal lots.

As already discussed, *supra* at 12-14, *Mugler v. Kansas,* 123 U.S. 623 (1887); *Reinman v. Little Rock,* 237 U.S. 171 (1915); and *Hadacheck v. Sebastian,* 239 U.S. 394 (1915), are not even doctrinally relevant. Once again, those three cases were decided prior to *Pennsylvania Coal v. Mahon,* 260 U.S. 393 (1922), and its decision to treat regulatory takings under the Just Compensation Clause. *Id.* at 413-15. They can hardly stand for the notion that in "as applied" challenges, a court's finding of a legitimate exercise of police power ends the analysis under the Takings Guarantee. This obviously sufficed for challenges of state regulations under the Fourteenth Amendment. The Takings Guarantee, as already noted, requires more.

The three pre-*Pennsylvania Coal* cases are factually inapposite as well. *Mugler* concerned an 1881 Kansas statute prohibiting the manufacture of intoxicating liquors. 123 U.S. at 654-57. The defendants in the case owned breweries, the operation of which was enjoined by the Kansas legislation. *Id.* at 656-57. The Court in *Mugler* made clear that no other uses of the property were restricted:

> "A prohibition simply upon the use of property for purposes that are declared, by valid

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[2] *See Mugler v. Kansas,* 123 U.S. 623 (1887); *Reinman v. Little Rock,* 237 U.S. 171 (1915); *Hadacheck v. Sebastian,* 239 U.S. 394 (1915); *Miller v. Schoene,* 276 U.S. 272 (1928); and *Goldblatt v. Hempstead,* 369 U.S. 590 (1962).

> legislation, to be injurious to the health, morals or safety of the community, cannot [be challenged]. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by any one, for certain forbidden purposes, is prejudicial to the public interests."

Id. at 669.

In *Reinman*, the city ordinance in question prohibited the establishment of livery stables within a certain four-block area. 237 U.S. at 172-73. Again there was no question that the claimant's property could be put to other uses under the ordinance. In *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), the ordinance under review had been issued by the city of Los Angeles, and restricted the operation of a brickyard or brick kiln. *Id.* at 404-05. The claimant averred (but nowhere on the record was this confirmed) that his property was worth $800,000 before the regulation, and $60,000 after it came into force. *Id.* at 405. The Court in *Hadacheck* took some pains to liken the Los Angeles regulation to that enacted by Little Rock in *Reinman*, going so far as to say that both claimants had a "like investment in property, encouraged by then conditions; a like reduction of value and deprivation of property . . . [and] a like assertion of an arbitrary exercise of the power of prohibition." *Id.* at 410. More significantly, the U.S. Supreme Court agreed with the California Supreme Court's determination that the Los Angeles ordinance did not "absolutely deprive the owners of a real property within such limits of a valuable right incident to their ownership." *Id.* at 412 (*quoting Ex parte Kelso*,

82 P. 241 (Cal. 1905) (an earlier California decision striking down a San Francisco ordinance which categorically prohibited the operation of a quarry)). It seems plain, therefore, that the Court in *Hadacheck* did not believe that the value of the claimant's property had been so substantially diminished.

Of greater relevance are those cases decided after *Pennsylvania Coal* in 1922. *Miller v. Schoene*, 276 U.S. 272 (1928), is often cited for the notion that the *Mugler* line of authority survived Justice Holmes's decision in *Pennsylvania Coal*. Indeed, this Court has previously made this suggestion. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 490-91 (1987). Nonetheless, the clear reading of *Miller* is that the plaintiff in error never raised a Just Compensation claim; his sole argument was under the due process clause of the 14th Amendment. *Miller*, 276 U.S. at 277. And, once again, there was no question in this case that the enforcement of Virginia's Cedar Rust Act, so as to require the claimant to cut down the infected cedar trees on his property, *id.*, did not work even marginally to diminish the value of Plaintiff's land. *Pennsylvania Coal* is nowhere cited in *Miller*, and one might validly assume that the question of substantial diminution of value was not even presented.

The decision in *Miller* is also completely consistent with a parallel line of cases decided by this Court on zoning regulations. It is to this line of cases that *Miller* primarily refers. *See id.* at 279-80 (*citing inter alia, Euclid v. Ambler Realty*, 272 U.S. 365 (1926)). The Court, in deciding *Miller*, must have determined that regulations which did not "go too far," to use Justice Holmes's formulation in

Pennsylvania Coal, 260 U.S. at 415, simply did not implicate the Takings Guarantee. Likewise, *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), also features a Fourteenth Amendment challenge to a city ordinance. *Id.* at 591. In this case, the town of Hempstead restricted dredging and pit excavating. *Id.* This Court held that "there is no evidence in the present record which even remotely suggests that prohibition of further mining will reduce the value of the lot in question." *Id.* at 594. Moreover, the *Goldblatt* Court noted that had the regulation substantially taken the value of the land, just compensation would have been due under *Pennsylvania Coal*. *Id.*

This Court, as suggested above, has been consistent in its treatment of the problem of land-use regulations. If the quintet of so-called "nuisance exception" cases are merged with the zoning cases beginning with *Welch v. Swasey*, 214 U.S. 91 (1909) and *Euclid*, 272 U.S. 365 (1926), a clear pattern emerges. When a land-use regulation only marginally impacts the value of private property, the more forgiving standard of due process is used. But at some point along the continuum, a taking occurs and Fifth Amendment just compensation is triggered. If all of these cases are plotted along the continuum, there is no decision which says that payment of just compensation can be avoided where virtually all of the value of land has been taken by regulation.

As for *Keystone*, this Court's 1987 decision reviewing the successor statute of the coal subsidence law featured in *Pennsylvania Coal*, it was again made clear that the claimant had failed to show substantial diminution in value. *Keystone*, 480 U.S. at 492-93 (claimants had "failed to make a showing of diminution in value sufficient to

satisfy the test set forth in *Pennsylvania Coal* and our other regulatory takings cases."). Chief Justice Rehnquist, in dissent in *Keystone*, noted that:

> "[O]ur cases have never applied the nuisance exception to allow complete extinction of the value of a parcel of property. Though nuisance regulations have been sustained despite a substantial reduction in value, we have not accepted the proposition that the State may completely extinguish a property interest or prohibit all use without providing compensation."

Id. at 513 (Rehnquist, C.J., dissenting).

A majority of courts that have revisited this issue after *Keystone* have concurred with this proposition.[3] Among the cases in the federal Courts of Appeals so agreeing are *McDougal v. County of Imperial*, 942 F.2d 668 (9th Cir. 1991), in which the Ninth Circuit noted that:

> "We cannot agree that any legitimate purpose automatically trumps the deprivation of all economically viable use, such that whenever a regulation has a health or safety purpose, no compensation is ever required even if the land owner is thereby denied all use of his property."

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[3] For representative decisions of state supreme courts, *see Department of Natural Resources v. Indiana Coal Council, Inc.*, 542 N.E.2d 1000, 1003 (Ind. 1989), *cert. denied*, 493 U.S. 1078 (1990); *Easter Lake Estates, Inc. v. Polk County*, 444 N.W.2d 72, 75-76 (Iowa 1989) ("Ordinarily, [police powers] may be exercised without payment of compensation. The use of police power may rise to the level of a compensable taking, however, if the control or regulation substantially deprives the owner of the property's use and enjoyment.") (citations omitted).

Id. at 676. Two recent decisions of the Federal Circuit have ruled likewise. *See Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1176 (Fed. Cir. 1991) ("Nothing in *Keystone* . . . supports the notion that public purpose alone permits total destruction of property rights without compensation"); *Yancey v. United States*, 915 F.2d 1534, 1540 (Fed. Cir. 1990) ("We favor . . . the position that the *Keystone* opinion did not hold that the nature of governmental activity conclusively forecloses all claims for just compensation.").[4]

The Fourth Circuit's recent decision in *Esposito v. South Carolina Coastal Council*, 939 F.2d 165 (4th Cir. 1991), *reprinted at* Pet. App. 158, also presented a challenge of South Carolina's 1988 Beachfront Management Act. *Id.* at 166-68. This case concerned two sets of claimants. One class of property-owners was prohibited from *re*building homes on their property by virtue of section 1(A) of the 1988 Act. *See* S.C. CODE ANN. § 48-39-290(A) (Supp. 1990). Citing *Keystone* for the proposition that a land-use regulation may constitute a taking if it does not substantially advance legitimate state interests *or* denies an owner economically viable use of his land, *Keystone*, 480 U.S. at

[4] Although *Empire Kosher Poultry, Inc. v. Hallowell*, 816 F.2d 907 (3d Cir. 1987), seems to be the only case interpreting *Keystone* to deny just compensation even where a regulation takes all the value of property, *id.* at 915, a careful reading reveals that this was merely *dictum*. *Empire Kosher* was a case involving a quarantine of diseased poultry, and so was like *Miller v. Schoene*, 276 U.S. 272 (1928) (destruction of diseased cedar trees). *Empire*, 816 F.2d at 909-11. The Third Circuit held that the USDA regulation did not substantially diminish the value of the poultry. *Id.* at 915-16.

485 (*quoting Agins*, 447 U.S. at 260), the *Esposito* court examined the economic impact of the rebuilding prohibition of the 1988 Act. *Esposito*, 939 F.2d at 169-70. The Fourth Circuit held that the claimants had failed to show that the prohibition on *re*building their homes worked a substantial diminution in the value of their property, since there was no requirement that existing structures had to be demolished. *Id.* at 170.[5] Implicit in the Fourth Circuit's approach was a rejection of the idea that *Keystone's* analysis ended with a finding that a land-use regulation advanced a legitimate state interest.

[5] The other set of claimants in *Esposito*, led by Mr. Chavous, raised the same claim as presented here by Mr. Lucas: that the Act's prohibition of building *any* structures beyond the setback line was a taking. The Fourth Circuit ruled that this claim had been mooted by subsequent changes in the Beachfront Management Act, 1990 Act No. 607, *codified at* S.C. CODE ANN. § 48-39-290(D) (Supp. 1990). *See Esposito*, 939 F.2d at 171.

Section 48-39-290(D) of the Act was adopted on June 25, 1990, more than two years after the Council had drawn the setback lines which prevented David H. Lucas from building on his property. For the two years prior to the 1990 amendments to the Act, the Petitioner was thus without *any* administrative remedy. During this two year period, the regulatory taking of the Council could not have been relieved by any remedy, save for judicial review. Under *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), this temporary taking suffices to defeat any assertion that a State's regulation did not ripen, for purposes of justiciability, into a compensable action. *Id.* at 314-22. *First English* modified *Agins v. Tiburon*, 447 U.S. 255 (1980), and its progeny, to the extent those cases purported to deny review of temporary

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The Constitution requires more than a proper exercise of the police power for a state to evade its duty of providing just compensation. The economic impact of the regulation on the property must also be reviewed. The fact that no case has decided to deny compensation where there has been a total elimination of value indicates that the fundamental principle of the Takings Guarantee has not been diluted by a nuisance exception.

B. There is No Public Policy Justification for Recognizing a Nuisance Exception in Cases Where the Value of Property Was Totally Eliminated by Regulation.

1. Environmental Objectives Have Been Achieved by Land-Use Regulations Which Fall Short of Rendering Property Worthless.

Petitioner submits that South Carolina's 1988 Beachfront Management Act is aberrant in totally precluding development in the beachfront area. This does not mean

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regulatory takings claims for lack of finality. *See First English*, 482 U.S. at 311-12. Mr. Lucas's case is in precisely the same posture as that of the petitioner in *First English*.

The South Carolina Supreme Court, in rendering its judgment in this case of February 11, 1991, did not consider the impact of the 1990 amendment in providing administrative relief to property owners. The Council sought to brief this issue, but this request was denied by that court. The South Carolina Supreme Court thus implicitly held that Mr. Lucas had a ripe claim for compensation under the Constitution's Fifth Amendment.

that Petitioner now challenges the public policies underlying the Act. Petitioner wishes to point out that relatively few other federal, state, or local environmental prohibitions would be affected by the Court's decision that just compensation is due in this case. Only a very small number of such regulations, when actually applied to particular parcels, have the effect of eliminating the total value of the property.

The 1988 South Carolina Act (as amended in 1990) eschews a confiscatory policy in every respect other than the one at issue here: its categorical prohibition of building beyond the setback line. *See* 1988 Act, § 1(A), *codified at* S.C. CODE ANN. § 48-39-290(A) (Supp. 1990). This categorical prohibition is logically inconsistent with the 40-year "retreat" policy articulated in the Act's legislative findings, 1990 Amendments, § 1(6), *codified at* S.C. CODE ANN. § 48-39-250(6) (Supp. 1990), and the earlier expressed concern to avoid burdensome regulations that would result in takings. 1977 Act, § 2(C), *codified at* S.C. CODE ANN. § 48-39-30(C) (1987). Despite the apparent inconsistency, Petitioner believes that the South Carolina legislature can be given the benefit of the doubt on this point.[6] Nonetheless, this Court could still decide that the

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[6] To its credit, the South Carolina legislature sought to soften the impact of the building prohibition by allowing, in its 1990 Amendments, a special permit process for property-owners seeking variances. 1990 Amendments, § 3, *codified at* S.C. CODE ANN. 48-39-290(D)(1) (Supp. 1990). As noted above, *supra* at 7, these special permits are heavily conditioned.

As for Mr. Lucas, the Respondent had earlier indicated that no variance would be granted in his case. Trial Stipulation ¶ 16, J.A. 3-4; Tr. at 108-109, J.A. 7-8.

regulation at issue here is peculiar. A holding that it (and similar regulations) constitute takings, would not, therefore, seriously disrupt state and federal environmental protection efforts.

Petitioner does not doubt that there are a host of innocuous regulations which, when applied to particular plots of land, become confiscatory. But, generally speaking, Petitioner is not aware of many classes of environmental regulation which go so far as the South Carolina 1988 Act in barring all development of private property, and essentially mandate that the land be left in its natural state for the benefit of the public. As for federal legislation in this field, a few examples might be illustrative.

At the outset, it is important to realize that both Congress and the executive branch have been mindful of the importance of limiting the confiscatory impact of environmental regulations. In Executive Order 12630, signed by President Reagan on March 15, 1988, 53 Fed. Reg. 8859 (1988), *reprinted at* 5 U.S.C.A. § 601 app. (1991), this concern was manifest. The purpose of the Order was to provide guidance to federal agencies in the drafting of regulations, and the Order warned that "governmental actions that do not formally invoke the condemnation power, including regulations, may result in a taking for which just compensation is required." *Id.* § 1(a). Among these regulations were those "imposed on property that substantially affect its value or use." *Id.* § 3(b).

In Petitioner's judgment, no federal environmental legislation would be affected if this Court were to decide that a complete diminution in value constitutes a *per se* taking. The much-discussed, federal wetlands legislation

and regulation do not categorically prohibit all use of affected parcels. Under section 404 of the 1977 Clean Water Act (CWA), 33 U.S.C. § 1344 (1988), a comprehensive permit system was created for wetlands. In a constitutional challenge to this provision of the CWA, this Court noted that the permitting system envisioned for wetlands protection did not deny "other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred." *United States v. Riverside Bayview Homes*, 474 U.S. 121, 127 (1985). Certain activities do not even require permits under this CWA provision, including farming and ranching. *See* 33 C.F.R. § 323.4 (1991).[7]

Likewise, federal flood plain controls would be unaffected by a ruling that land-use regulation which goes too far requires compensation under the Fifth Amendment. The federal scheme for combatting this hazard is illustrative of good policy. The National Flood Insurance Act of 1968 and the Flood Disaster Protection Act of 1973 (with its amendments of 1977), all *codified at* 42 U.S.C. §§ 4001-4128 (1988), do not categorically ban the construction of structures in flood plains or other areas in

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[7] Although state regulation of wetlands is more advanced than the federal scheme, *see* N. Robinson, *Environmental Regulation of Real Property* § 11.03[1], at 11-7 (1990), most state regulations do not purport to ban all development within wetlands. These exemptions include those activities which do not have any significant or irreversible impact on wetland values. *See, e.g.*, CONN. AGENCIES REGS. § 22a-39-3.1 (1990); MINN. STAT. ANN. § 105.391(3) (1990); N.Y. COMP. CODES R. & REGS. tit. 6, § 665(7)(g) (1990).

which the risk of flooding is high. Instead, this federal law requires that states and municipalities identify flood-risk areas, and that landowners purchase flood insurance if they wish additional federal aid. The sanction for building in a flood plain is the denial of cheap, government-subsidized, flood insurance. *See* 42 U.S.C. § 4106 (1988).[8] Like wetlands protections, the federal flood-plains legislation has been upheld against a facial constitutional challenge, *see, e.g., Texas Landowners Rights Ass'n v. Harris*, 453 F. Supp. 1025, 1021-31 (D.D.C. 1978), *aff'd*, 598 F.2d 311, *cert. denied*, 444 U.S. 927 (1980), although this Court has recognized that state flood-plain building restrictions, made pursuant to the federal scheme, could constitute a regulatory taking. *See First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

Once again, the point is that few environmental regulations have the effect of denying all "economically viable use" of private property, as per the formulation of *Agins v. Tiburon*, 447 U.S. at 260. Most have, therefore, withstood facial challenges. And most would be unaffected in "as applied" contexts as long as there was no showing by the claimant that the value of the property had been virtually eliminated by the regulation.

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[8] The 1973 Flood Disaster Protection Act also required that before a federally-supervised lending institution provided a mortgage on a home that flood insurance be procured by the buyer. This requirement was dropped in the 1977 amendments. *See* Pub. L. No. 95-128, 91 Stat. 1145 (1977).

2. The Burden of Confiscatory Environmental Regulation Should Fall on Society and Not on Individual Property Owners.

Petitioner is not unmindful of the costs for government involved in the *per se* rule of regulatory takings. If South Carolina is truly intent on promoting tourism and recreation along its shore, as it suggested in the Beachfront Management Act, *see* S.C. CODE ANN. § 48-39-250(1) (Supp. 1990), it must be prepared to compensate landowners if it insists that they may not develop their property and must leave it in its natural state. This compensation will not be cheap. David Lucas's two parcels were estimated in value by the trial court to be worth in excess of $1.2 million. Common Pleas Order, at 8, Pet. App. 40. Apparently the South Carolina legislature recognized this and made the decision to incur the cost. 1977 Act 518, *codified at* S.C. CODE ANN. § 48-39-180 (Supp. 1990).

Society clearly values coastal property. Americans love the beach. To live at the shore is desirable. For those same reasons, the state is entitled to regulate the coastal zone and to make this wonderful resource available to the public. Petitioner agrees that individual property owners may have to endure some regulation in order to balance the public's interest in this resource with their own property rights. But, as already noted, South Carolina's legislation goes too far. South Carolina has, in effect, requisitioned coastal property and has forced property owners to convey to the state the most basic elements of property-ownership. For most South Carolina shore-dwellers this process will be slow, and perhaps even painless, as the Act's 40-year retreat policy begins to

work. In Mr. Lucas's case, the deprivation in property rights was immediate and total.

In *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922), the cornerstone of this Court's modern regulatory takings jurisprudence, Justice Holmes noted that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Id.* at 416. In reply to this admonition, this Court has later referred to the notion of "reciprocity of advantage," also mentioned by Justice Holmes. *Id.* at 415. This is the idea that a regulated landowner receives some benefit from the restrictions placed on the use of his property. *See, e.g., Keystone*, 480 U.S. at 491 n.21; *Agins*, 447 U.S. at 262 ("The zoning ordinances benefit the appellants as well as the public by serving the city's interest in assuring careful and orderly development of residential property."); *Penn Central*, 438 U.S. at 133 n.30. But the notion of "reciprocal advantage" has never been used in a case where the value of property has been totally taken by legislation, and where only a few property-owners are asked to bear the burden of a new, socially-decided preference. *See, e.g., Keystone*, 480 U.S. at 511-12 (Rehnquist, C.J., dissenting); *Penn Central*, 438 U.S. at 140 (Rehnquist, J., dissenting). Indeed, the principle has been limited, by its very terms, to cases where a land-use regulation may impact to *raise* the value of property, and so in fairness the claimant should be barred from reaping the advantage of a regulation she is also challenging. *See Agins*, 447 U.S. at 262 ("In assessing the fairness of [a] zoning ordinance[ ], these benefits must be considered along with any diminution in market value that the appellants might suffer.").

This Court has been cognizant of Justice Holmes's inquiry in *Pennsylvania Coal* of "upon whom the loss of the changes desired [by regulation] should fall." 260 U.S. at 416. As this Court noted in *Armstrong v. United States*, 364 U.S. 40 (1960), the "Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.* at 49; *see also Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893) (The Fifth Amendment is intended to prevent "the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him."). At bottom, Petitioner believes that South Carolina's goal of enhancing the public resource of the state's beaches is laudable. But if the state chooses to regulate away the entirety of Petitioner's property interests, then Petitioner is being asked to bear alone a burden the public should gladly take up.

III. JUST BECAUSE A REGULATION IS WITHIN A STATE'S POLICE POWER DOES NOT MEAN THAT COMPENSATION CAN BE DENIED UNDER THE FIFTH AMENDMENT.

A. Not All Police Powers Are Directed Against Nuisances.

The South Carolina Supreme Court held that a mere finding of a legitimate use of a state's police power makes the object of a land-use regulation a nuisance, and thus

immune from compensation under the Takings Guarantee. *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 898 (S.C. 1991) ("By failing to contest these legislative findings, Lucas concedes that the beach/dune area . . . is an extremely valuable public resource; that the erection of new construction *inter alia*, contributes to the erosion and destruction of this public resource; and that discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm."). Petitioner submits that this approach of classifying all police powers as nuisance-directed completely empties the Just Compensation Clause of all meaning. After all, under the Fifth Amendment, *all* takings of private property must be pursuant to legitimate public purposes. *See Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240 (1984) ("The 'public use' requirement is thus coterminous with the scope of a sovereign's police powers."). Denying compensation when the taking is made for the public good makes the Takings Guarantee a license for the government to take by regulation that which it would have to pay for by virtue of an exercise of eminent domain and, in effect, eliminates the concept of inverse condemnation.

To the extent that this Court wants to recognize a nuisance exception, it must be narrowly drawn. Not all legitimate exercises of a state's police power in land-use regulation are directed against public nuisances. This Court has continuously agreed that "the nuisance exception . . . is not coterminous with the police power itself." *Keystone*, 480 U.S. at 491 n.20 (*quoting Penn Central*, 438 U.S. at 145 (Rehnquist, J., dissenting)). Although in *Keystone*, a majority of this Court chose not to make the distinction between police powers and nuisances, this Court did *not* question the principle that legitimate land-

use regulations under police powers need not be invariably directed against nuisances. Instead, the Court seemed to decide only in *Keystone* that the distinction was not important to that case. *Id.* at 490-92.

Cases subsequently interpreting *Keystone* on this point seem to agree that a distinction remains to be drawn between regulations supported by legitimate public policy, and those specifically directed against public nuisances. *See Florida Rock Industries, Inc. v. United States*, 21 Cl. Ct. 161, 166-68 (1990); *Western Energy Co. v. Genie Land Co.*, 737 P.2d 478, 482 (Mont. 1987) ("The [U.S. Supreme] Court has never allowed the nuisance exception to allow complete extinction of a parcel of property.") (paraphrasing *Keystone*, 480 U.S. at 470 (Rehnquist, C.J., dissenting)).

The necessity of this distinction is graphically illustrated in this case. Once again, Petitioner did not question that the Beachfront Management Act was a valid exercise of South Carolina's police power and was a valid land-use regulation. To have raised such a challenge would have been futile and silly. But the question of legitimate land-use regulation is rather different from the inquiry whether the activity being regulated constitutes a public nuisance so as to come within a categorical exception to the Takings Guarantee. Petitioner maintains that the 1988 Act was directed primarily to promoting the public resource of the coastal zone (and not to preventing any perceived public harm), and, in any event, Mr. Lucas's planned construction of homes was not a noxious use of the property qualifying for nuisance regulation without compensation.

B. The South Carolina Act Was Directed More to Promoting a Public Good Than Preventing a Public Harm.

It is important at this stage of the analysis to determine "the character of the governmental action," *Penn Central*, 438 U.S. at 124, featured in the South Carolina legislation. The object of this inquiry is not to determine whether the 1988 Act was made pursuant to South Carolina's legitimate police powers. Rather, the point is to establish whether the regulation was aimed more to promoting a public good in a public resource or to preventing "a property owner from using his property to injure others." *Keystone*, 480 U.S. at 511 (Rehnquist, C.J., dissenting). Only if the regulation's primary purpose is preventing serious public harm emanating from the "misuse or illegal use" of property, *Curtin v. Benson*, 222 U.S. 78, 86 (1911), can it even be argued that the Fifth Amendment does not apply. *See also Orion Corp. v. State*, 747 P.2d 1062, 1078 (Wash. 1987) ("We [have] held that [a] challenged regulation could not effect a[ ] . . . taking, unless the nature of the encumberance imposed by the regulation went beyond preventing harm to actually enhance a publicly owned right in land."), *cert. denied*, 486 U.S. 1022 (1988).

As has already been discussed, the legislative purposes of the 1988 Act were many. Among the perceived assets of the beach/dune system along the South Carolina Coast was in "provid[ing] the basis for a tourism industry," for "provid[ing] a habitat for numerous species of plants and animals," for "protect[ing] life and property by serving as a storm barrier . . . and contribut[ing] to

shoreline stability in an economical and effective manner," as well as "provid[ing] a natural healthy environment for the citizens of South Carolina to spend leisure time which serves their physical and mental well-being." 1990 Amendments to Beachfront Management Act, 1990 Act No. 607, § 1(1), *codified at* S.C. CODE ANN. § 48-39-250(1) (Supp. 1990).

It is readily apparent that the underlying purpose of the 1988 Act is to promote tourism and public use on South Carolina's beaches. The passage above emphasizes the recreation values of the shore. Moreover, in actually implementing the forty-year retreat policy, the South Carolina legislature made clear that there would be no effect on beach amenities. *See* 1988 Act, §§ 1(A) & 1(C)(3), *codified at* S.C. CODE ANN. §§ 48-39-290(A) & 48-39-290(C)(3) (Supp. 1990) (allowing fishing piers to be constructed seaward of setback line, provided they were open to the public, as well as noting that nothing in the Act "prohibits the construction of fishing piers or structures which enhance beach access seaward of the baseline"). Even when the Act speaks to the problem of beach erosion, the concern seems to be that it negatively impacts on tourism. *See* 1990 Amendments, § 1(5), *codified at* S.C. CODE ANN. § 48-39-250(5) (structures designed to promote beach stability may actually contribute to the "loss of dry sand beach which is so important to the tourism industry.").

Petitioner appreciates the difficulty of determining the primary intent of regulations. As the Supreme Court of Washington has recently noted:

> "We realize that the determination of whether a given regulation seeks to protect the public from harm will not always be an easy decision. Both the conferral of benefit and the prevention of

> harm are often present in varying degrees. However, the initial decision as to whether the predominant goal of the regulation is the prevention of a real harm to the public or the conferral of a benefit upon other publicly held property must be made according to the facts of each individual case."

Presbytery of Seattle v. King County, 787 P.2d 907, 912 n.13 (Wash. 1990), *cert. denied*, 111 S.Ct. 284 (1990). Petitioner maintains that South Carolina's beachfront management scheme is primarily devoted to the enhancement of its interest in the "publicly held property" of the state's beaches.

Although the concern of beach erosion harming private property is mentioned in the Act, 1990 Amendments, § 1(4), *codified at* S.C. CODE ANN. § 48-39-250(4) (Supp. 1990), this appears to be a remotely-perceived harm. Indeed, to the extent that the South Carolina legislature was concerned with serious public harm, it was focussed on the damage that erosion might cause to other homes on the beach. It appears that the 1988 Act is not directed against a nuisance at all, but, rather, is intended (by its very language) to convince homeowners to stop living in harm's way.

This same safety justification was advanced by the state of Pennsylvania in *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922), in order to support its coal subsidence statute, even against homeowners who had agreed to live on top of a mine. *See id.* at 409-11. This contention was roundly rejected by the Court as being paternalistic. *Id.* at 415 ("If [the homeowners] had been so shortsighted as to acquire only surface rights without the right of support, we see no more authority for [Pennsylvania] supplying the latter without compensation than there was for taking

the right of way in the first place and refusing to pay for it because the public wanted it very much.").

To the extent that the South Carolina legislature might have been bothered by the impact of coastal erosion on property, it, too, would be advancing a paternalistic ground for characterizing the construction of beachfront homes as nuisances. The 1988 Act deserves no deference in this inquiry concerning the underlying purpose of the regulation in preventing serious public harm. As Justice Holmes noted in *Pennsylvania Coal*, "[t]he greatest weight [in these cases] is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power." 260 U.S. at 413. While this inquiry may be premised on the substantive due process standard of *Lawton v. Steele*, 152 U.S. 133, 137 (1894) ("To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals"), a court must objectively find that the regulation is actually being directed against a nuisance. It is not enough for the legislature to so declare.

C. Construction of a Home Cannot be Considered a Nuisance.

The class of public harms that fall within the traditional ambit of the nuisance exception has been quite small. As suggested earlier in this brief, *supra* at 12-14, the periods before the decision in *Mugler v. Kansas*, 123 U.S. 623 (1887), and after *Pennsylvania Coal v. Mahon*, 260

U.S. 393 (1922), are of particular significance in identifying cases in which any nuisance exception was applied as a condition on the Takings Guarantee.[9] Some earlier cases denied a landowner compensation when the subject activity was a *per se* nuisance. *See, e.g., Wynehamer v. The People,* 13 N.Y. 378, 454 (1856) (articulating this rule but still striking down a statute characterizing intoxicants as a public nuisance *per se*). A *per se* nuisance is a use in its inherent nature so hazardous as to make the danger of extreme and serious injury so probable as to be almost a certainty. *See Jager v. First National Bank,* 7 A.2d 919 (Conn. 1939) (*citing Melker v. New York,* 83 N.E. 565, 567 (N.Y. 1908)). A few courts went further and held that a land-use activity had to be a nuisance *in fact*; it was not enough to show that there was some extreme (but still hypothetical) harm. In *Commonwealth v. Tewksbury,* 52 Mass. (11 Met.) 55 (1846), the Massachusetts Supreme Judicial Court held that compensation would only be denied in cases where the regulation is directed against an activity which is "injurious to the public," and only in cases "[a]mounting to an obvious public exigency." *Id.* at 57-58.

Post-*Pennsylvania Coal* cases have tried to return to a narrower view of nuisances as being those activities

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[9] Between *Mugler* and *Pennsylvania Coal* was a period in which regulatory takings cases were decided under due process standards, which, as noted above, gave substantial deference to state regulation.

The Fifth Amendment's Takings Guarantee was first applied against the states by this Court in *Chicago, B. & Q. R. Co. v. Chicago,* 166 U.S. 226 (1897). Of course, many state constitutions featured a similar Just Compensation clause. *See* Connors, *supra* note 1, at 149-50.

which injure others. *See Keystone,* 480 U.S. at 511-12 (Rehnquist, C.J., dissenting) (the nuisance exception applies only "where the government exercises its unquestioned authority to prevent a property owner from using his property to injure others."). This Court in *Miller v. Schoene,* 276 U.S. 272 (1928), declined to make the determination whether an activity (the keeping of diseased cedar trees that endangered nearby apple growers) was a "nuisance according to the common law." *Id.* at 280; *see also Goldblatt v. Hempstead,* 369 U.S. 590, 593 (1962) (question whether activity was a common law nuisance not "controlling").

Petitioner agrees that the determination of an activity as a public nuisance under the common law is largely irrelevant. All that characterization meant was that the activity was punishable as a crime. *See Prosser and Keeton on the Law of Torts* 645-46 (5th ed. 1984). Rather, the question must be whether the harm being addressed by the regulation is truly of public concern and is of a magnitude and imminence to consider any categorical denial of compensation. As this Court has ruled in cases of property taken in times of emergency, public necessity must be clearly and convincingly demonstrated before compensation will be denied. *See, e.g., United States v. Central Eureka Mining Co.,* 357 U.S. 155 (1958) (no compensation for shutdown of gold mine during World War II); *Bowditch v. Boston,* 101 U.S. 16 (1879) (private property destroyed to contain fire).

The Petitioner's planned construction of homes on the two coastal lots cannot seriously be maintained as a "serious public harm," as the South Carolina Supreme Court held. *See Lucas v. South Carolina Coastal Council,* 404 S.E.2d 895, 899 (S.C. 1991). The South Carolina legislature, in drafting the 1988 Act (and in the 1990

Amendments), did not really contend that beachfront homes posed a threat to neighboring property and individual safety. Indeed, as has already been noted,

> "the [1988] Act's gradual forty-year retreat scheme, rather than immediate destruction of all offending structures, is clear proof that [the South Carolina] claimants' residences are not dire threats to public safety and welfare. A 'public nuisance' ought to be abated, not phased out through a half-lifetime of attrition."

Esposito v. South Carolina Coastal Council, 939 F.2d 165, 173 n.2 (4th Cir. 1991) (Hall, J., dissenting). The construction of beach bungalows does not pose an imminent threat of danger to public interests.

Moreover, living in a home cannot really be considered a "noxious" use of land, as that term was used in *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887). While in the past, statutes have declared (and courts confirmed) certain structures to be public nuisances, this has been solely attributable to illegal or immoral conduct occurring inside. *See, e.g., Black v. Circuit Court of Eighth Judicial District*, 101 N.W.2d 520 (S.D. 1960) (prostitution); *Brown v. Perkins*, 78 Mass. (12 Gray) 89 (1858) (illegal liquor establishment); *State ex rel. Williams v. Karston*, 187 S.W.2d 327 (Ark. 1945) (gambling). There is no case which suggests that simply residing in a house constitutes a public nuisance.

It bears repeating again that the South Carolina Supreme Court did not make a specific finding that Mr. Lucas's intended use of his property constituted a nuisance. Rather, that court simply took Petitioner's concession that the 1988 Act was a legitimate exercise of police power and twisted this into an admission that building a home on the beach was a noxious use of property. *Lucas*, 404 S.E.2d at 898, 900. If the South Carolina Supreme

Court's decision is not overturned it will mean that a mere showing of legitimate exercise of police power in land-use regulation, without any concomitant inquiry into the intended use of the parcel and the economic impact of the regulation upon the owner, will suffice in denying just compensation under the Fifth Amendment to the United States Constitution.

CONCLUSION

For the foregoing reasons, the judgment of the South Carolina Supreme Court in this matter should be REVERSED.

Respectfully submitted,

A. Camden Lewis
Counsel of Record
Lewis, Babcock & Hawkins
1513 Hampton Street
P.O. Box 11208
Columbia, South Carolina 29211
(803) 771-8000

Gerald M. Finkel
Attorney for Petitioner
Finkel, Goldberg, Sheftman & Altman
P.O. Box 1799
Columbia, South Carolina 29202

David J. Bederman
Of Counsel
Emory University School of Law
Gambrell Hall
Atlanta, Georgia 30322

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October Term, 1991

-DAVID H. LUCAS,

Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of South Carolina

RESPONDENT'S BRIEF ON THE MERITS

C. C. HARNESS, III
Counsel of Record
General Counsel for Respondent
South Carolina Coastal Council
4130 Faber Place, Suite 300
Charleston, SC 29405
(803) 744-5838

RICHARD J. LAZARUS
Of Counsel
Washington University School of Law
1 Brookings Drive
St. Louis, MO 63130

T. TRAVIS MEDLOCK
Attorney General for the State of South Carolina
KENNETH P. WOODINGTON
Senior Assistant Attorney
Rembert C. Dennis Office Building
P.O. Box 11549
Columbia, SC 29211
(803) 734-3970

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether the 1990 amendments render petitioner's permanent takings claim not ripe and, because the parties specifically reserved any temporary takings claim for later consideration by the state courts, whether petitioner's temporary takings claim is not ripe for this Court's review.

2. Whether a state law barring the construction of permanent structures on properties adjacent to the shoreline and historically subject to severe episodic erosion constitutes an unconstitutional taking of private property solely because of the property's diminution in market value.

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No. 91-453

In The

Supreme Court of the United States

October Term, 1991

DAVID H. LUCAS,

Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

On Writ Of Certiorari To The Supreme Court
Of The State Of South Carolina

RESPONDENT'S BRIEF ON THE MERITS

STATEMENT

1. Petitioner, David H. Lucas, purchased two vacant oceanfront lots in the Beachwood East Subdivision of the Wild Dunes development on the Isle of Palms, Charleston County, South Carolina, in December 1986. Petitioner had been intimately associated with that development since 1979, having served as a contractor, a realtor and in the position of assisting the board of Wild Dunes with planning. Tr. 24; 33-34. During that time period, prior to petitioner's purchase, the property suffered from severe episodic erosion. The erosion problems between 1981 and 1983 were so serious that the Mayor of the locality issued twelve emergency orders, under the auspices of respondent South Carolina Coastal Council, for sand scraping and sand bagging to protect man-made structures on lots in the immediate vicinity of petitioner's property. Tr. 99. Respondent itself issued its own emergency sand scraping order in 1983, along with an erosion

control permit to construct an 850 foot rock revetment immediately west of petitioner's lots and a 1,300 foot rock revetment to the east of the property. Tr. 100-101. That structure is the longest revetment for which respondent has ever issued an erosion control permit. Tr. 101.

These serious erosion problems were consistent with the fragile nature of the barrier island within which petitioner's property is located. Isle of Palms has long been dominated by significant fluctuations in the shoreline. Tr. 72-88. As a result, since the time that beachfront construction in Wild Dunes began in the late 1970's, homes and other man-made structures have been seriously threatened by erosion. Tr. 74, 75, 99; 103-104.

2. Approximately 19 months after petitioner's purchase, the South Carolina legislature amended the 1977 Coastal Zone Management Act by enacting the 1988 Beachfront Management Act. The purpose of the Act was primarily to prevent construction in the fragile beach/dune system that endangers life and property and that directly damages the system itself (which in turn affects recreation, the tourist economy, aesthetics and habitat). Section 1 and Section 2 of the 1988 Beachfront Management Act are now codified as § 48-39-250 and § 48-39-260, Pet. App. 97-104. These purposes were to be implemented by developing a setback scheme, S.C. Code Ann. § 48-39-280 (1988 Supp.), regulating reconstruction of man-made structures, S.C. Code Ann. § 48-39-290 (1988 Supp.), and regulating new construction, S.C. Code Ann. § 48-39-300 (1988 Supp.).

Pursuant to the 1988 Act, respondent, South Carolina Coastal Council, surveyed the entire coastline of the state to effectuate the Act's "forty year retreat policy." S.C. Code Ann. § 48-39-280(A) (1988 Supp.) The purpose of this survey was to determine the location of a baseline parallel to the shoreline for each "standard erosion zone" and each "inlet erosion zone" in order to identify those properties most vulnerable to erosion from the sea. *Id.* Once the baseline was located, a no construction line was established twenty feet landward. Landward still of this line a setback line was established at a point forty times the average annual erosion

rate, but no closer to the baseline than twenty feet, based upon the best historical and scientific data adopted by the Council. S.C. Code Ann. § 48-39-280(B)(1) (1988 Supp.). Significant restrictions on construction applied to land seaward of either line, but the more significant restrictions applied to land seaward of the twenty foot no construction line. § 48-39-290 and 300 (1988 Supp.).

Respondent's location of the baseline seaward of petitioner's lots was based on historical evidence of significant episodes of erosion in the area during the last forty years. Tr. 13, Stipulation 14. In particular, respondent found that while the east end of Isle of Palms has generally been accretional, it has been subject to serious erosion during the past forty years. The shoreline has been landward of petitioner's seaward property line fifty percent of the time since 1949. Tr. 84. Further, the shoreline has been landward of the road behind petitioner's property between fifteen and twenty percent of the time. Tr. 84. Petitioner's two lots were entirely under water as recently as 1963 and, in 1973, a pond formed over a portion of the lots. Tr. 78-84. Even though the severe erosion episodes are themselves temporary in nature, the shoreline in their aftermath can remain in place for several years. Tr. 95-96, Exhibits 10-22.

Pursuant to this historical evidence the baseline was located landward of the two lots in question. This is important because the 1988 Act prohibited new construction of habitable structures seaward of the twenty foot no construction line. S.C. Code Ann. § 48-39-300 (1988 Supp.). Thus, petitioner could not build his proposed homes.

3. Petitioner did not challenge respondent's location of the baseline landward on his property. Under the Beachfront Management Act, petitioner was entitled to seek formal administrative, followed by judicial, review of the location of the baseline, setback line, or erosion rate, if he believed that any of the three was adopted in error. S.C. Code Ann. § 48-39-280(E) (1988 Supp.). Petitioner instead brought this collateral takings challenge in the circuit court.

Petitioner's sole claim at trial was that the Act equated to an unconstitutional permanent taking based on the severity of

its economic impact on the market value of his property.[1] He did not challenge nor ask the Court to consider the reasonableness or the validity of the Act, but relied instead solely upon the alleged loss of use and diminution in value of his property as the justification for his taking claim. At trial, petitioner offered testimony that the highest and best use of the property was for the construction of single-family homes. Tr. 48-49. Based upon his inability to develop the lots as single-family residential, petitioner's expert concluded that the lots had no value. Tr. 49. Petitioner offered no testimony concerning his inability to use the lots for purposes other than single-family construction, his attempt to sell the properties, or that the lots had no value for any other uses after passage of the Act. Nor did he offer any evidence to show the property was suitable in its natural state for development, other than to stipulate to the fact that houses have been built on nearby lots.

The Permit Administrator for the Coastal Council testified that the Act did not prevent construction of temporary structures, nor prohibit recreational or other uses of the property. Tr. 98. Respondent's appraiser testified that there is value left in the lots based upon what another person or an adjacent property owner would pay for the lots. Tr. 115-117. Pursuant to a pre-trial stipulation, neither petitioner nor respondent addressed the distinct issue of whether the 1988 Act amounted to a temporary taking of petitioner's property. Tr. 14, Stip. 16.

4. The trial court concluded that the Act amounted to an unconstitutional permanent taking of petitioner's property. Pet. App. 36-41. The court awarded damages to respondent in the amount of $1,232,387.50, which was the court's assessment of the sum of the property's market value prior to the law's enactment, the real property taxes paid since, and the simple interest on the mortgage balance. Pet. App. 40. The

[1] Petitioner's complaint claimed more wide-ranging allegations, but they were not pursued at trial or on appeal. See Pet. App. 154-155.

court further ordered that, "upon satisfaction of the judgment [petitioner] . . . tender deeds to [the property] to the State of South Carolina." Pet. App. 41.

5. On June 25, 1990, while this case was on appeal to the South Carolina Supreme Court, the South Carolina Legislature amended the 1988 Beachfront Management Act. Those amendments, in pertinent part, allow a coastal property owner to apply for a "special permit" to construct habitable structures seaward of the baseline, notwithstanding the prior ban on such construction. S.C. Code Ann. § 48-39-290(D) (1990 Supp.).[2] Respondent accordingly petitioned the state supreme court to consider the impact of § 48-39-290(D) on the petitioner's claim that there had been a total taking. (Respondent's Motion dated August 1, 1990). The court denied petitioner's request on the grounds that the Court Rules did not allow for the relief sought. (August 1990 letter from Deputy Clerk)

6. On the merits, the South Carolina Supreme Court reversed the decision of the circuit court. Pet. App. 1.

The court opined that petitioner erroneously relied upon the legal position that he had lost "all economically viable use" of his property and this factor alone entitled him to compensation under the Fifth Amendment. Pet. App. 12. Reviewing the current factors applied by the United States Supreme Court in analyzing "takings" cases, the court concluded that because Lucas failed to challenge the purpose of the 1988 Act and indeed conceded the importance and validity of the Act, his claim failed. Pet. App at 8-12. After listing the purposes and findings, the court stated that it was "in no position to, *sua sponte* take issue with the legislative findings." The court rejected his theory that "in *all* cases when all economically viable use is extinguished by regulation, compensation is due." Pet. App. 12.

[2] Respondent has adopted regulations to implement these special permit procedures. (See S.C. Ann., R.30-15(F) (1990).) To date petitioner has not applied for a special permit or otherwise availed himself of the opportunity to develop his lots as allowed under the Act, as amended in 1990.

SUMMARY OF ARGUMENT

1. Petitioner's taking claim is not ripe because § 48-30-290(D) of the 1990 Amendments to the 1988 Beachfront Management Act now allows petitioner the opportunity to apply for a permit to construct homes seaward of the baseline. Pet. App. 125. Given the existence of this remedy, petitioner's claim that the respondent has permanently taken his property is not ripe for review until and unless he applies for and is denied such a special permit. The issue of temporary takings, which was preserved at trial by stipulation, likewise is not ripe.

2. Should this Court nonetheless conclude that petitioner's taking claim presents a justiciable case and controversy, the Court should reject the petitioner's extreme position that he is entitled to compensation based solely upon diminution in value. Such a test flies squarely in the face of all the Court's takings jurisprudence. This Court has repeatedly rejected the claim that diminution in value, standing alone, determines whether an unconstitutional taking has occurred. The Court has instead made clear that in addition to economic impact, both the character of the government action at issue, and the reasonableness of the investment-backed expectations implicated must be considered. Indeed, special consideration must be given to the character and purpose of the state interest because at a minimum there is current agreement among members of the Court that there is a class of government actions effectively insulated from the requirement of compensation because they merely prevent harmful uses of property. Likewise, reasonableness of the investment-backed expectations of the landowner can have a significant impact upon the Court's determination of whether a compensable taking has occurred.

3. Finally, assuming this Court does not confine its review to the petitioner's untenable "bright line" economic impact test, the South Carolina Supreme Court's judgment should be upheld based upon the three factors cited as central to the takings formula. These factors include the character of the government action, the interference with reasonable

investment-backed expectations, and the economic impact of the regulations.

As it relates to the character of the government action, the 1988 Beachfront Management Act was passed in response to serious public harm created by "ill-planned" development that has been built ever closer to the dangers of erosion and storms. Pursuant to direction by the federal government, South Carolina implemented a setback scheme to prevent construction in the fragile beach/dune system. This prohibition took into account the danger to life and property not only to those building, but also to nearby neighbors. There is no question that the barrier island that the petitioner seeks to build upon is hazardous and that such construction could interfere with an already delicate environment. In this respect, the land use restriction petitioner challenges is analogous to common law tort doctrine that limits a property owner from using his property in a way that, because of the property's physical characteristics, causes physical harm to other persons and property.

As it relates to the petitioner's reasonable investment-backed expectations, several factors militate against a conclusion that the expectation to build homes on these lots is reasonable. First, and as mentioned above, such construction creates a serious threat to health and safety. No one can have a reasonable expectation to harm others in such a manner. Second, in the area of cases dealing with government largess and economic property, this Court has recognized that despite significant losses to property holders, no compensable taking occurs simply because regulations upset settled expectations. There seems no justification for treating petitioner's expectations differently simply because they involve real property. Third, the petitioner had no reasonable expectation to construct upon this volatile and fragile environment. There has developed a strong legal tradition that recognizes that no one has a right or an expectation to change the natural character of certain types of land or to use such land for a purpose for which it is unsuited in its natural state. This principle applies to the shifting sands of Isle of Palms, where the petitioner's lots have historically proven unfit for construction. Finally,

these legal principles concerning expectation are also supported by the fact that petitioner was intimately involved with the development of the Wild Dunes subdivision. He knew of the dangers and should have expected the government to act in a responsible way by implementing setbacks that prevent ill-planned development.

Lastly, petitioner is not deprived of all his economic value or use of his property. His whole case is centered on the sole proposition that he had been denied "highest and best" use of his property to construct single-family homes. No effort was made to assign value to other uses. Indeed, he retains significant value in his bundle of property rights. Given that the property is unsuitable for what he deems "highest and best" use, what he retains is an appropriate and reasonable use of his property.

I. PETITIONER'S TAKINGS CLAIM, INCLUDING ANY CLAIM BASED ON AN ALLEGED TEMPORARY TAKING OF HIS PROPERTY, IS NOT RIPE FOR ADJUDICATION IN LIGHT OF THE 1990 AMENDMENTS TO THE ACT

As the Solicitor General correctly notes (U.S. Amicus Br. 8-10), the 1990 amendments to the Beachfront Management Act have deprived this case of the requisite ripeness and therefore rendered it unsuitable for the Court's review. Petitioner can no longer claim a permanent taking without first seeking relief under the 1990 law. In addition, any possible remaining temporary takings claim was specifically reserved in the courts below, which should be allowed to address such a claim in the first instance.

1. This Court has consistently held that a land use challenge is not ripe where the property owner has failed to apply for a variance or to seek a determination of whether a permit would be issued by the regulating agency. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) ("Because the appellants have not submitted a plan for development of their property as the ordinances permit, there is as yet no concrete controversy regarding the application of the specific zoning provisions."); *San Diego Gas & Electric Co. v. City of San Diego*,

450 U.S. 621, 633 (1981) ("further proceedings are necessary to resolve the federal question whether there has been a taking at all."); *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 190 (1985) ("[R]espondent has not yet obtained a final decision regarding how it will be allowed to develop its property. Our reluctance to examine takings claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause."); *MacDonald, Sommer and Frates v. County of Yolo*, 477 U.S. 340, 348-351 (1986) ("Our cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it.")

Established precedents of the Court further demonstrate that lack of the requisite ripeness is a key jurisprudential threshold requirement. (Wright, Miller & Cooper, Federal Practice and Procedure, § 3532.3 (1984 & 1991 Supp.) Accordingly, the ripeness requirement can and must be considered at the appellate level as well as in the trial court. (*Williamson County; MacDonald, Sommer and Frates.*)

This Court should not consider this case unless and until petitioner first avails himself of a plainly feasible opportunity to obtain a "special permit" under § 48-39-290(D) of the 1990 Act and S.C. Code Ann. (1990) § R.30-15(F) of respondent's implementing regulations.[3] While an opportunity to obtain such a "variance" from the Act's setback requirements was arguably not previously available to him,[4] the 1990

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[3] Respondent previously petitioned the South Carolina Supreme Court prior to issuance of the opinion for consideration of the impact this section had on the permanent takings claim. That petition was denied. (See argument at p. 5, *supra*.) The dissent called for a remand to the respondent prior to award of damages to see if a special permit would be issued in *Lucas*. App. 30-31.

[4] Arguably, such a procedural opportunity existed even under the pre-existing version of the Act. (See Respondent's S.C. Supreme Court brief on this issue at p. 41) S.C. Code Ann. Section 48-39-180, which was originally enacted in 1977, survived the 1988 amendments to the Act and remains in the

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amendments provide petitioner a clear administrative avenue of relief. Yet petitioner has assiduously avoided pursuing this option. He has filed no application, and to this day has failed to give respondent an opportunity to consider petitioner's development proposal. Conversely, respondent has been deprived of the ability to determine whether and how residential development of the type contemplated by petitioner is consistent with state law. Under these circumstances, it is simply impossible to gauge petitioner's claim that the Act has worked a permanent taking of his property. The present case thus falls squarely within the Court's past precedents on the ripeness issue, and a dismissal or remand on that ground is required.

2. Petitioner argues that notwithstanding the effect of the 1990 amendments, he has suffered a "temporary taking" for which compensation is required. Hence, he argues, the case remains ripe for adjudication on the merits. (Petitioner's Brief on the Merits at 27-28, n.5.) Petitioner cites this Court's decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), in support of this novel argument. Petitioner's reliance on *First English* is misplaced. First, petitioner's argument is simply not responsive to the fact that his *permanent* takings claim is not ripe. As this Court observed in *First English*, "the landowner has no right under the Just Compensation Clause to insist that a 'temporary' taking be deemed a permanent taking." *First English* at 317.

Turning specifically to the "temporary takings" issue, the Solicitor General correctly observes – while petitioner overlooks – that "the quite distinct issue of a temporary taking was not addressed by either court below." U.S. Amicus Brief

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statute's current version, provides in pertinent part that a permit applicant whose application has been denied may seek a *de novo* judicial hearing to determine whether that permit decision results in a taking. If the court responds in the affirmative, "*it shall enter a finding that the action shall not apply to the land of the plaintiff*, or in the alternative, that the Council shall pay reasonable compensation for the loss of use of the land." *Id. (Emphasis added.)*

at 11. Contrary to petitioner's representations to this Court, the issues of whether and to what extent petitioner has incurred a temporary taking under the Takings Clause have simply never been addressed. The parties stipulated below that respondent reserved the right, as to temporary damages, to argue that no permit had been applied for by petitioner. Tr. 14, Stip. 16. Petitioner further acknowledged that no permits had been obtained from the Wild Dunes Board, the City of Isle of Palms, or respondent, and that no effort had been made to seek a vested right for the proposed structures. Additionally, petitioner has never challenged the location of the setback or baseline on the property. Tr. 39-40.

Respondent further agrees with the Solicitor General's position that the state court system should be afforded the initial opportunity to address the issue of whether and to what extent a temporary taking of petitioner's property occurred during 1988-1990. Principles of comity and cooperative federalism dictate that a remand for that purpose be ordered, if this Court views the temporary takings claim as viable. This disposition is particularly compelling in light of petitioner's failure to date to address all relevant aspects of takings analysis (see argument at p. 12, *infra*); the significant threshold barriers to petitioner's claim of a temporary taking;[5] and the dearth of relevant evidence in the record on those threshold factual issues.[6]

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[5] For example, "mere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.' " *Agins v. City of Tiburon*, 447 U.S. 255, 263 n. 9 (1980), citing *Danforth v. United States*, 308 U.S. 271, 285 (1939); also see *First English*, 482 U.S. at 318. Secondly, the Court has stated that interim damages are due only "where the government's activities have already worked a taking *of all use* of property, (such that) no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective. (*First English*, 482 U.S. at 322.)

[6] Not only did petitioner fail to present evidence that he was prepared to build in 1988 (thus providing a basis for fair rental analysis), he also failed to offer any evidence as to when such construction would have been completed.

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Thus, the issue of interim damages is not ripe for review and any consideration of the takings issue at this juncture would be improper. The appropriate course is, instead, either to dismiss the writ as improvidently granted or, alternatively, to remand the case to the state courts to determine: a) the effect on petitioner's takings claim of the 1990 amendments; and b) the extent to which petitioner has suffered a temporary taking under the principles set forth in *First English* and related precedents.

II. THE SOUTH CAROLINA SUPREME COURT CORRECTLY REJECTED PETITIONER'S CLAIM THAT A STATE LAW BARRING CONSTRUCTION OF PERMANENT STRUCTURES ON PROPERTIES ADJACENT TO THE SHORELINE CONSTITUTES A TAKING OF PRIVATE PROPERTY SOLELY BECAUSE OF THE PROPERTY'S DIMINUTION IN MARKET VALUE.

Petitioner's takings claim rests, at bottom, on the following proposition: a state police power measure that prohibits a landowner from constructing a permanent structure on his land necessarily constitutes a taking of private property requiring the payment of just compensation under the Fifth Amendment's Takings Clause. This must be so, petitioner contends, because of the severe economic impact that such a restriction has on the market value of the property. Petitioner's contention is fatally flawed from the outset. This Court has never embraced such an extreme view, but has instead repeatedly stressed that several factors, including the government's reasons ("the character of the government

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Logically, only upon completion of construction would petitioner have been entitled to compensation, assuming a temporary taking to have transpired. Nor was any evidence introduced to show that all use of the subject property was lost between 1988 and 1990. In fact, no evidence was presented to show *any* use was lost except the right to build. Respondent is unaware of any case which has to date awarded damages for a temporary taking based on such a dearth of relevant evidence or in the face of such a speculative scenario.

action"), are of critical concern to takings analysis. Where, moreover, as in this case, the restriction on development is necessary to prevent serious injury to public health and safety and substantial physical harm to nearby properties, no taking has resulted. This Court's decisions, as well as settled state law property and tort doctrine, make plain that in such circumstances the government cannot be deemed to have "taken" private property in contravention of the Takings Clause.

Because, moreover, the validity of petitioner's contrary view was the sole issue before the South Carolina Supreme Court, the judgment of that court should be affirmed. There is no need to define the precise scope of those police power measures that can justify the severest of economic impacts. Nor, more particularly, need the Court determine whether the restriction challenged here, in fact, falls within the contours of it, however precisely defined. This is because petitioner has effectively conceded that it does for the purpose of this litigation.

A. The Only Issue Before This Court Is The Validity Of Petitioner's Contention, Rejected By The State Supreme Court, That Whether A State's Restriction On The Use Of Property Amounts To A Taking Depends Exclusively On Its Economic Impact.

Petitioner maintained throughout the litigation in the courts below that the reasons for the governmental restriction on the use of his property are wholly irrelevant to the question of whether that restriction amounts to an unconstitutional taking of private property. According to petitioner, the economic impact is independently determinative of the takings inquiry. The validity of that contention is therefore the only issue properly before this Court.

1. At trial, petitioner never questioned the urgency of, and precise reasons for the prohibition on permanent construction seaward of that baseline; nor did he offer any alternative management methods the State could use short of prohibition. Petitioner chose instead to base his takings claim on the narrow view that any such inquiry as to urgency was irrelevant so long as petitioner could establish the severity of

the economic impact. Petitioner, accordingly, introduced evidence at trial that was, for all practical purposes, confined to the issue of the degree of the economic impact. See Tr. 19-80.

Indeed, during respondent's presentation of witnesses, petitioner sought to prevent respondent from introducing evidence regarding the public harm that would be caused by construction on petitioner's property. According to petitioner, none of that evidence was "relevant material". Trial Tr. 94-95.[7]

In particular, petitioner objected to respondent's introduction of evidence regarding the "dilatorious [sic] effects in terms of erosion by construction of habitable structures along the beach front" and to whether, apart from a prohibition on permanent structures, the government had alternative methods available for dealing with the erosion problem. Trial Tr. 94. Respondent argued that such testimony did not have "anything to do with issues outlined in the case." Trial Tr. 94-95. And in response to respondent's claim that such evidence was relevant to the "balancing process," that is whether "the harm against which we're protecting is so significant . . . that we don't have to pay money" (Trial Tr. 95), petitioner claimed that no such balancing was called for by the Constitution. Trial Tr. 97.[8]

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[7] This is clearly set out in the full circuit court *Trial* transcript. See Trial Transcript, 94-97.

[8] Most of the exchange between petitioner and respondent is reproduced here in full (Mr. Harness is counsel for respondent; Mr. Howe and Mr. Smith are counsel for petitioner):

Q: (Mr. Harness):

Can there be dilatorious [sic] effects in terms of erosion by construction of habitable structures along the beach front?

A: (Witness):

I think there can, depending on the nature of the construction itself.

Q: All right sir. Now, in terms of dealing with erosion from a management standpoint, what are the alternatives that you have in order to deal with the problem?

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The trial court, for that matter, allowed respondent to introduce its evidence, but only on the condition that it "won't take too long." Trial Tr. 97. In subsequently ruling in petitioner's favor, the trial court focused on the economic impact

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A: I have also . . .

Mr. HOWE: Your honor, excuse me. We have been sort of waiting for Mr. Harness to move into some relevant material. We really don't think it's relevant. We find it interesting but I don't think it has anything to do with issues outlined in the case. We object to it on – to all the testimony on the grounds of relevance. Mr. HARNESS: Your honor, if I might for a moment, . . . Mr. HOWE: Let me take that a step further. If he can show a public interest in the regulation – we've never contended there wasn't a public interest in the regulation. We just contend they've got to pay for it like any other public interest in regulation.

So if he's trying to show a basis for why they passed the Act, we haven't raised an issue with the Act. We haven't raised an issue as to its validity; only the price tag associated with it.

Mr. HARNESS: Your Honor, if I might . . .

THE COURT: I don't believe he's arguing about the Act in itself.

Mr. HARNESS: No, sir. What I'm arguing about really is the balancing process that you have to go through. It's our position that the State needs to show that the harm against which we're protecting is so significant as to balance that decision making process of the Judge in favor of the State; to say that the public interest is so significant that we don't have to pay money. . . .

Mr. SMITH: Your Honor, not to belabor the point, but to the extent Mr. Harness talks about a balancing process between acquisition in our opinion of this gentleman's property to the public interest and some balancing that raises beyond that so they don't have to pay for it, with all due respect, the Constitution of the State of South Carolina has already attained that balancing process, and it says that if private [property] is taken for a public purpose then the landowner has to be paid just compensation.

That's the only real issue in this case.

Trial Tr. 94-97.

of the challenged law, without taking into account either the character of the governmental action or whether petitioner's investment-backed expectations were "reasonable" in nature. Pet. App. 39-40.

2. Petitioner's argument before the South Carolina Supreme Court was no different. He supported his takings claim solely in terms of the state law's economic impact on petitioner's property. Petitioner's brief in the state supreme court accordingly argued that "[t]he focal point in assessing whether a 'taking has occurred' is the effect that the governmental action has on the property." Resp. Br. S.C. Sup. Ct. 2. Petitioner further allowed for no occasion under which the purpose of a police power measure might justify an especially severe economic impact: "The argument that public policy can dictate this result is simply amiss." *Id.* at 5. Based on the briefs and oral argument, the South Carolina Supreme Court understood petitioner to be advancing just such a narrow and extreme contention. According to the court, petitioner's position was that if a police power measure deprives him of the economic value of his property, "he must be compensated for it even if the regulation depriving him of such is a use-restriction regulation enacted to prevent serious public harm. Pet. App. 3. The court correctly concluded that petitioner's concession of the validity of the purposes of the Beachfront Management Act necessarily extended to the legislative findings within it. Those findings detailed the serious public harm, including physical injury to human life and to adjoining properties that the Act's restrictions on development were intended to prevent:

> Lucas concedes that the beach/dune area of South Carolina's shores is an extremely valuable public resource; that the erection of new construction, *inter alia*, contributes to the erosion and destruction of this public resource; and that discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm. Pet. App. 8.

The sole issue before the South Carolina Supreme Court, therefore, was the validity of the extreme view that the

character of the government's action was irrelevant, once a moratorium on permanent construction was established.[9] The court below had no occasion to consider in detail, nor did respondent have any need to establish, the precise ways in which the restriction would prevent serious public injury. At no point, except at this late juncture, did the petitioner stray from his position that he was entitled to compensation simply because he could not build houses on his lots.

3. For that reason, moreover, petitioner cannot now legitimately argue that the South Carolina Supreme Court's decision is deficient in this regard. The findings and purposes recognize that threats to life and property and the natural system which further fosters protection of life and property, and other significant state interests can be controlled only by "discouraging new construction in close proximity to the beach/dune system and encouraging those who have erected structures too close to the system to retreat from it." S.C. Code Ann. § 48-39-250(6) (1990). He conceded the truth of the findings and policies leaving the respondent only with the responsibility of showing that the property in question is not suitable for the construction that he seeks.

Petitioner likewise cannot avoid that result by pretending, as he now does, that the lower court's decision stands instead for the plainly untenable proposition that no such exacting judicial examination of the character of the governmental action is required even when the plaintiff raises that issue. That is certainly not respondent's position. Nor is that a fair reading of the decision of the state supreme court below.

Indeed, it borders on the disingenuous for petitioner now to argue that the South Carolina Supreme Court "converted a complex inquiry into a bright-line test." Pet. Br. 9. That is instead precisely what *petitioner* sought to do in contending before that court and the trial court that economic impact alone was determinative of the takings inquiry and that no

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[9] See Pet. App. 9 ("Lucas rests on a solitary argument, *viz*, that he is still, despite these concessions, entitled to compensation from the State.").

consideration of the character of the governmental action was necessary.

4. The narrow issue petitioner raised below is likewise the only issue presented by petitioner's petition for a writ of certiorari: "Does a land-use regulation, pursuant to a state's police power, require compensation under the Constitution's Fifth Amendment if it totally eliminates the value of private property." Pet. i. Consistently, petitioner asks this Court to endorse its proffered rule: "the enforcement of land-use regulations which have the effect of eliminating the value of private property should be *per se* subject to the just compensation requirement of the Fifth Amendment." Pet. Br. 19; see also *Id.* at 28-35.

For the first time in this litigation, however, petitioner has now added an alternative argument to his position. He contends that even if some police power measures may validly severely diminish property's market value, the law challenged here falls outside that category. Pet. Br. 35-45. Because the case was not tried on that basis and because the judgment of the South Carolina Supreme Court was based on a contrary concession by petitioner before that court, petitioner should not be allowed, by changing its position, to obtain this Court's review of an issue not presented to the court whose judgment is under review. Petitioner's "certiorari conversion" is understandable, given the clearly erroneous nature of his extreme view of the Takings Clause. But that is not a substitute for the requirement that the issue be one litigated before the lower courts.

B. In Determining Whether A Police Power Restriction Constitutes A Taking Of Private Property, A Court Must Consider, In Addition To Its Economic Impact On The Property Owner, Both The Character Of The Governmental Action And The Extent To Which It Interferes With Reasonable Investment Backed Expectations, Particularly Where The Purpose Of The Challenged Restriction Is To Prevent Injury To Public Health And Safety And To Protect Other Property From Physical Harm.

Petitioner's "solitary argument" (Pet. App. 9) that "he is entitled to compensation from the State" because of the

economic impact of the Beachfront Management Act, without the need for further inquiry, should be squarely rejected. This Court has repeatedly rejected that very proposition, expressly holding that both the character of the governmental action and the reasonableness of the investment-backed expectations upon which the property owner relies are central to the takings analysis. The Court has, furthermore, long held that police power measures may deprive a property owner of virtually all economic value of property, without constituting an unconstitutional taking, in those instances where the governmental measure prevents serious injury to public health and safety or otherwise bars nuisance-like activity.[10]

1. Contrary to petitioner's submission, this Court has "eschewed the development of any set formula for identifying a 'taking' forbidden by the Fifth Amendment, and ha[s] relied instead on ad hoc, factual inquiries into the circumstances of each particular case." *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224 (1986); see, e.g., *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1005 (1984); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). Whether "justice and fairness" require the payment of just compensation in a particular case requires consideration of three somewhat overlapping factors, including "the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action . . . " *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 495 (1986), citing *Kaiser Aetna*, 444 U.S. at 175.

In this case, therefore, the reasons for the South Carolina Coastal Council's prospective restriction, including its precise location and size, on the construction of permanent structures on land within a specified distance of the shore are critical to

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[10] Even amici sympathetic to petitioner's position recognize the fatal flaw in his takings analysis. See, e.g., Amicus Br. Institute for Justice 23 ("Lucas argues that as long as the taking is total, the question of justification need not be considered at all. Yet no balanced theory of takings could be that protective of private property against the legitimate claims of the state.").

the takings analysis. Were, for instance, the Coastal Council's action entrepreneurial in character, that is, simply designed to enhance the economic value of the state's own property, a taking would likely be more readily found. *Penn Central Transportation Co. v. New York City*, 438 U.S. at 124. On the other hand, the mere fact that the state was instead acting pursuant to its police power authority would most certainly not, for that reason alone, avoid any taking issue. *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 491 n.20 (1987), citing *Penn Central Transportation Co.*, 438 U.S. at 145 (Rehnquist, J., dissenting). Whether "justice and fairness" required the payment of just compensation for the degree of the impact on the landowner in question would depend on the kinds of concerns being addressed by the police power measure.

To be sure, there is disagreement among members of the Court regarding the precise scope of those governmental police power concerns justifying more serious intrusions. But there has nonetheless been virtual unanimity that there exist certain core police power measures that may justly and fairly impose on a private property owner the most severe of economic impacts, extending even to virtually all market value, when necessary to prevent serious injury to the public. Compare *Keystone Bituminous Coal Assn.*, 480 U.S. at 491, (describing Court's "hesitance to find a taking when the State merely restrains uses of property that are tantamount to public nuisances") with *Id.* at 511 (Rehnquist, C.J., dissenting) ("a taking does not occur where the government exercises its unquestioned authority to prevent a property owner from using his property to injure others without having to compensate the value of the forbidden use"). Nor is such unanimity at all surprising, in light of the past precedent of this Court, which has long endorsed that principle. It is likewise reflective of well settled state property law doctrine, which recognizes that private property rights do not extend to the creation of nuisances or otherwise to causing injury to the health and safety of another or to physical harm to nearby properties.

No doubt this Court's most famous articulation of this fundamental principle of property and constitutional law is in

Justice Harlan's opinion for the Court in *Mugler v. Kansas*, 123 U.S. 623 (1887). At issue in *Mugler* was the constitutionality of a state law that, by prohibiting the manufacture and sale of intoxicating liquors, rendered the plaintiff's investment in brewery buildings and machines virtually valueless. Like petitioner here, the plaintiff in *Mugler* argued that such a deprivation was unconstitutional "unless compensation is first made for the diminution in the value of their property, resulting from such prohibitory enactments." *Id.* at 664. The Court squarely rejected that view on the ground that the Constitution "cannot be supposed . . . to impose restraints upon the [state] exercise of their powers for the protection of the safety, health, or morals of the community." *Id.*

According to the Court, "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." *Id.* at 665. "The power which the States have of prohibiting such use by individuals . . . is not – and, consistently with the existence and safety of organized society, cannot be – burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community." *Id.* at 669.

The *Mugler* principle, which this Court has since frequently,[11] and recently,[12] reaffirmed, was in accord with settled precedent of the Court at the time. As aptly described by the Solicitor General (Br. 14), "[t]he roots of the [*Mugler*] principles extend deep into the Court's precedents and historical definitions of private property rights, as against the

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[11] See, e.g., *Goldblatt v. Hempstead*, 369 U.S. 590, 593 (1962); *Miller v. Schoene*, 276 U.S. 272, 280 (1928); *Gorieb v. Fox*, 274 U.S. 603 (1927); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Reinman v. City of Little Rock*, 237 U.S. 171 (1915); *Plymouth Coal v. Pennsylvania*, 232 U.S. 531 (1914); *Welch v. Swasey*, 214 U.S. 91 (1909); *Camfield v. United States*, 167 U.S. 518, 522-23 (1897); *Powell v. Pennsylvania*, 127 U.S. 678, 683 (1888).

[12] See *Keystone Bituminous Coal v. DeBenedictis*, 480 U.S. at 490.

correlative power of the government to abate nuisances and protect public health and safety from serious harm."[13]

For instance, prior to *Mugler*, the Court had repeatedly upheld the government's right to tear down a structure in order to prevent the spread of fire, without compensating the property owner. See *Respublica v. Sparhawk*, 1 U.S. (1 Dall.) 357, 362 (1788); *Bowdich v. Boston*, 101 U.S. 16, 18-19 (1879). At the time of the *Mugler* decision, state courts had likewise long endorsed the principles that it announced. See, e.g., *Stuyvesant v. Mayor & City of New York*, 7 Cow. 588, 603-605 (NY 1827); *People v. Hawley*, 3 Mich. 330, 342 (1854); *Kincaid's Appeal*, 66 Pa. St. 411, 423-24 (1870).

No doubt the single most influential, and widely cited, state court ruling was the Massachusetts Supreme Judicial Court decision in *Commonwealth v. Alger*, 61 Mass. 53 (1851).[14] In rejecting a challenge to an ordinance barring construction of wharves on the plaintiff's property – because it was seaward of a harbor line drawn by the government – the court announced the "settled principle . . . that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community." *Id.* at 84-85. Anticipating the very argument that petitioner

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[13] There is, accordingly, no merit to petitioner's claim that "[u]ntil this Court's decision in *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922), a property owner's claim that a federal or state regulation had diminished the value of land did not merit treatment under the Fifth Amendment's takings guarantee. See, e.g., *Andrus v. Allard*, 444 U.S. 51, 67 (1979) (citing pre-*Pennsylvania Coal* regulatory takings cases); *Penn Central Transportation Co. v. City of New York*, 438 U.S. at 144-45 (Rehnquist, J., dissenting) ("there is no 'taking' where a city prohibits the operation of a brickyard within a residential area"), citing *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

[14] This Court has frequently embraced the Massachusetts court's reasoning in *Alger*. See, e.g., *Patterson v. Kentucky*, 97 U.S. 501, 505 (1878); *Munn v. Illinois*, 94 U.S. 113, 147 (1876).

advances today, almost 150 years later, the court further explained that "although it may diminish the profits of the owner, [it] is not an appropriation of the property to a public use, but the restraint of an injurious private use by the owner, and is therefore not within the principle of property taken under the right of eminent domain." *Id.* at 86.

Hence, regardless of its precise scope, the correctness of the basic proposition that a state can validly prevent construction of permanent structures on property where, because of the property's physical characteristics, such construction would create substantial risks of serious injury to public health and safety, cannot be gainsaid. Otherwise, plainly sensible measures such as prohibitions of building on lands prone to floods, mud slides, subsidence or earthquakes, would all constitute unconstitutional takings. Such police power measures cannot properly be understood as somehow "depriving" the landowner of any property rights. The landowner's grievance, if any, is better directed at the physical characteristics of the property and the well-settled principle of tort law barring uses of property injurious to others. See *Rowe v. Town of North Hampton*, 553 A.2d 1331, 1334 (NH 1989) ("The uniqueness of the land, not the financial circumstances of the owner, determines whether a hardship exists.").

Indeed, as explained by the Solicitor General (Br. 11-16), were the rule otherwise, government, as we know it, would be impeded in its everyday efforts to safeguard public health and safety. A government would be unable to order the destruction of an unsafe building, or to prevent profitable activities that pose danger to the surrounding community.[15] The government's ability to declare the unlawfulness of certain food products and drugs would, because such declarations would

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[15] See *Reinman v. City of Little Rock*, 237 U.S. 171 (1915) (prohibiting operation of stables in city where they produced "offensive odors" and were "productive of disease"); *Pierce Oil Corp. v. City of Hope*, 248 U.S. 498 (1919) (upholding a statute prohibiting storage of oils in tanks within 300 feet of dwellings, given danger of explosions); *Miller v. Schoene*, 276 U.S. 272, 279-80 (1928) (damage to apple orchards inflicted by diseased cedar trees justified law ordering destruction of cedars).

render existing supplies valueless, be conditioned on the government's willingness to pay their prior market value.[16] The government would even be chilled in its ability to prevent the spread of conflagration when those efforts would require the destruction of structures in the fire's path.[17] And, incredibly, a landowner would presumably possess a constitutional right to mine coal even if "the owner would necessarily unloose poisonous gases." *Pennsylvania-Coal v. Mahon*, 260 U.S. at 418 (Brandeis, J., dissenting).

2. For these reasons, isolated statements in this Court's opinions regarding the need for remaining "economic viability" cannot be read out of context as suggesting that economic impact, standing alone, is dispositive of the takings inquiry.'[18] That result would be flatly inconsistent with repeated and contemporaneous admonitions that takings analysis requires multi-factored inquiry. See page 27, *supra*. No doubt, for this reason, this Court has never applied economic viability as the sole factor in support of its conclusion that an unconstitutional taking has occurred.

Indeed, the proposition that "economic viability" must exist to avoid a takings claims cannot be squared with this Court's repeated rejection, before and since, of that very proposition. See *Keystone Bituminous Coal Co. v.*

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[16] *United States v. Carolene Products Co.*, 304 U.S. 144 (1938) (no taking although the defendant was prevented from shipping filled milk with its product, which was therefore rendered worthless); *North American Cold Storage Co. v. City of Chicago*, 211 U.S. 306, 320-21 (1908) (upholding order to destroy unwholesome food although value might otherwise remain); *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905) (upholding cremation requirement for garbage, though value might otherwise remain); *Powell v. Pennsylvania*, 127 U.S. 678 (1888) (upholding state law prohibiting the manufacture of oleomargarine, and the exclusion of evidence intended to show that because of preexisting investment, a business would be destroyed); *Patterson v. Kentucky*, 97 U.S. 501, 506 (1878) (prohibition of sale of condemned oil). See also U.S. Amicus Br. 12 n.3.

[17] See note 15, *supra*.

[18] See, e.g., *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *Keystone Bituminous Coal Co. v. DeBenedictis*, 480 U.S. at 485; *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987).

DeBenedictis, 480 U.S. at 491-93; *Penn Central Transportation Co.*, 438 U.S. at 131 ("reject[ing] the proposition that diminution in property value, standing alone, can establish a taking"); *Goldblatt v. Hempstead*, 369 U.S. at 590, 594 (1962); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). As it happens, those cases include *Penn Central*, which is the case in which the relevance of "economic viability" was first declared.[19]

The "economic viability" inquiry finds its genesis in a footnote quoting a concession made by the City of New York in *Penn Central*, 438 U.S. at 138 n.36. The city "conceded at oral argument that if appellants can demonstrate at some point in the future that circumstances have so changed that [Grand Central] Terminal ceases to be 'economically viable,' appellants may obtain relief." *Id.* Of course, placing such dispositive weight on remaining economic viability is far more appropriate in that case than here given the character of the police power concern there at issue (historic preservation). While historic preservation and aesthetic concerns are certainly legitimate and very important bases for police power restrictions on the use of land, it is entirely proper to weigh them less heavily in the takings equation when determining the constitutionality of their economic impact on a landowner, than one might weigh police power measures intended to prevent serious public health and safety risks.

The economic viability inquiry should, for this reason, have its greatest impact in traditional zoning cases where the police power is simply "adjusting the benefits and burdens of economic life to promote the common good." *Penn Central Transportation v. City of New York*, 438 U.S. at 124. In those circumstances, the police power measure is distributional in character, with the bottom line being the maximization of

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[19] In *Penn Central*, the Court elaborated on the relationship of the impact of an ordinance to the taking inquiry, suggesting "that a use restriction on real property may constitute a 'taking' * * * perhaps if it has an *unduly harsh* impact upon the owner's use of the property" (438 U.S. at 127 (emphasis added)). Whether an impact is "undue," of course, turns on the reasons for its imposition.

economic value; the fact that one property owner is being deprived of economic value virtually down to zero solely for the benefit of another economic interest would definitely trigger takings concerns. Cf. *Sporhase v. Nebraska*, 458 U.S. 941, 956 (1982). But that set of circumstances is a far cry from a case such as this one.

Here, the challenged power measure is not merely distributional in its purpose. It is not just striking a balance between competing economic interests. The challenged law is designed to prevent affirmative injury to public health and safety and to the environment from which comes further protection of public health, safety and welfare concerns. That is, of course, precisely the circumstance when economic impact is not dispositive of the law's constitutionality under the Takings Clause.

3. Hence, the South Carolina Supreme Court correctly rejected petitioner's exclusive contention before that court that the character of the government action could not defeat a takings claim brought against a restriction on the use of property that severely diminished its pre-legislation market value. Because, moreover, petitioner never disputed the contention that the restriction he challenged prevented serious injury to public health and safety and physical damage to neighboring properties, petitioner cannot now claim otherwise. The judgment of the South Carolina Supreme Court, therefore, can, and should, be affirmed on this ground alone.

Should, however, this Court either disagree with the South Carolina Supreme Court's construction of the scope of petitioner's concessions before that court or conclude that petitioner should at this late date be allowed to withdraw those concessions, the proper disposition would be to remand this case back to the South Carolina courts for their reconsideration in light of petitioner's position. The South Carolina courts would then have the opportunity to consider in the first instance: (1) the character of the challenged state restriction on development, including the purposes to be served by its adoption; (2) whether those purposes are in fact implicated in this case; and (3) whether those purposes are sufficiently

weighty to justify the economic impact imposed on petitioner's property.[20] Until that time, however, this Court's review would be premature and would deprive the state court of its prerogative first to consider the merits of petitioner's claims.

III. EVEN ASSUMING THAT PETITIONER IS NOT CONFINED TO HIS CONTENTION BELOW THAT THE ECONOMIC IMPACT OF THE STATE LAW ON HIS PROPERTY COMPELS THE CONCLUSION THAT A "TAKING" OCCURRED, THE SOUTH CAROLINA SUPREME COURT'S DISMISSAL OF HIS CLAIM SHOULD BE AFFIRMED BASED ON THE CHARACTER OF THE GOVERNMENT ACTION, THE UNREASONABLENESS OF PETITIONER'S INVESTMENT-BACKED EXPECTATIONS, AND THE PROPERTY'S REMAINING ECONOMIC USES.

As described above in Part II, respondent contends that the sole issue before this Court is the validity of petitioner's claim that the character and extent of the harm prevented by the Beachfront Management Act are irrelevant to the merits of petitioner's takings claim. The Court should therefore reject petitioner's attempt to inject a new issue in the litigation, by inviting the Court to conduct a more broad-based evaluation of the merits. But even if, contrary to our submission, this Court were to engage in such an inquiry, the judgment of the South Carolina Supreme Court should likewise be affirmed.

This Court has identified three factors as having particular significance in deciding whether a challenged governmental regulation amounts to an unconstitutional taking. These include: (1) "the character of the governmental action"; (2) "its interference with reasonable investment-backed expectations"; and (3) "its economic impact." *PruneYard*

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[20] The court would also have the opportunity to consider whether petitioner's investment-backed expectations were "reasonable" (see page 40, *infra*), and whether the trial court's finding of no remaining market value was clearly erroneous (see note 38, *infra*).

Shopping Center v. Robins, 447 U.S. 74, 83 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *Penn Central Transportation Co. v. City of New York*, 438 U.S. at 124. Review of these three factors leads to the inescapable conclusion that petitioner's property was not taken.

A. The State's Restriction On The Construction Of Permanent Structures On Petitioner's Property Is The Kind Of Government Measure That May Justifiably Cause A Severe Economic Impact Because It Prevents A Use Of Property That May Cause Serious Injury To Public Health And Safety And Physical Damage To Nearby Properties

As described above (pages 18-27, *supra*), "the nature of the State's action is critical in takings analysis" *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. at 488. Where, moreover, the state action is designed to prevent injury to public health and safety or physical damage to the property of others, the Court has "repeatedly upheld regulations that destroy or adversely affect real property interests." *Id.* at 489 n.18. "The special status of this type of state action can . . . be understood on the simple theory that since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity." *Id.* at 491 n.20. Because the Beachfront Management Act is in large part designed to prevent just this type of harm, the "character of the government action" in this case supports dismissal of petitioner's takings claim.

1. The Beachfront Management Act, Like Related Federal Legislation, Is Generally Designed To Prevent Serious Harm To The Public

In order to place the character and purposes of the 1988 Beachfront Management Act in perspective, some background in beach management is necessary. The precipitous decline of coastal environment and resources caused the U.S. Congress to pass the Coastal Zone Management Act of 1972. 16 U.S.C. 1451, et seq. (1988) (CZMA). The statute created a state-

federal partnership designed to assist states in managing their coastal zones.[21] While the 1972 provisions were concerned with a number of coastal problems, the 1980 amendments directed particular attention to the serious issue of continued ill-planned construction along the nation's beaches.[22] These amendments called upon the National Oceanic and Atmospheric Administration (NOAA), the administering agency, to ensure that the beach/dune system was protected but more importantly that the state programs should:

> At the least provide for . . . the management of coastal development to minimize the loss of life and property caused by improper development in flood prone, storm surge, geological hazard, and erosion-prone areas and in areas likely to be affected by or vulnerable to sea level rise, land subsistence and saltwater intrusion, and by the destruction of natural, protective features such as beaches, dunes, wetlands and barrier islands. 16 U.S.C. 1452 (2)(B) (1988)

The amendments also called for preparation of special area management plans for the purpose of protecting significant natural resources, reasonable coastal-dependent economic growth and improved protection of life and property in hazardous areas. 16 U.S.C. § 1452(3) (1988).

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[21] Currently twenty-nine states participate in the program. South Carolina had its program approved in 1979 and has continued its partnership with the federal government since that time.

[22] The House Conference Report reflects Congress' concern with coastal erosion and coastal hazards management. See H.R. Rep. No. 1012, 96th Cong., 2d Sess., reprinted in U.S. Code Cong. and Admin. News 4362, 4387. For example, in discussing the type of policies Congress encouraged the states to adopt, the House Report states that an appropriate enforceable policy for "a barrier island designated as a resource of national significance may be one which requires all development to be a certain distance from the beach in order to allow the island to provide its natural storm protective function." *Id.* at 4391. The House Report further suggests that federal regulations be made consistent with such state management programs noting that it costs the taxpayers 3.3 billion dollars per year (in 1980 dollars) to maintain construction in the nation's floodplains through the national flood insurance programs. See *Id.* at 4399-4400.

In its 1990 Amendments, Congress further addressed the problem of beachfront management by declaring it national policy to plan for global warming (16 U.S.C. 1451[1][1988]-[1990 Supp.]) and directed coastal states to enhance their coastal programs by "preventing or significantly reducing threats to life and the destruction of property by eliminating development and redevelopment in high hazard areas . . . " 16 U.S.C. § 1456(a)(2) (1988) (1990 Supp.)

NOAA has directed the states to first consider set-backs or other controls on development to limit the public's exposure to threats from severe storms, erosion and other coastal hazards in order to implement the coastal enhancement objectives. At present there are fourteen states implementing NOAA-approved beach set-back laws and most were developed with federal money made available through the CZMA.[23] South Carolina's 1988 Beachfront Management Act directly responded to the federal government's insistence that states improve their programs by controlling development in hazardous areas. NOAA approved the 1988 Beachfront Management Act Amendments (amending the original 1977 Coastal Zone Management Act) on February 15, 1989, stating that the amendments "still constitute an approvable program and that the procedural requirements of § 306(C) of the Coastal Zone Management Act have been met."[24] Noting that the 1988 Beachfront Management Act specifically addresses the federal concerns about loss of life and property due to improper development along coastal beaches as set out in § 303(2)(B) of the Coastal Zone Management Act, NOAA

[23] Maine, Delaware, Florida, Wisconsin, Rhode Island, Maryland, Alabama, Hawaii, New York, North Carolina, Michigan, New Jersey, South Carolina, Pennsylvania.

[24] Amendment No. 1 to the S. C. Coastal Management Program, Inclusion of the 1988 Beachfront Management Act, Final Findings of Approvability (February 1989).

recognized that South Carolina was directly dealing with a problem facing the nation and many states.[25]

In addition to the CZMA, Congress in 1982 passed the Coastal Barriers Resources Act that had as its purpose the restriction of federal expenditures and assistance that would encourage development of barrier islands. 16 U.S.C. § 3501 (1988). This Act is important to our analysis of the character of the state action because the Isle of Palms is a barrier island. In this important legislation Congress sought to discourage the development of these barrier islands because:

> (3) Coastal barriers serve as natural storm protective buffers and are generally unsuitable for development because they are vulnerable to hurricanes and other storm damage and because natural shoreline recession and movement of unstable sediments undermine man-made structures;
>
> (4) Certain actions and programs of the Federal Government have subsidized permitted development on coastal barriers and the result has been loss of barrier resources, threats to human life, health, property and expenditures of millions of tax dollars each year. 16 U.S.C. § 3501(a)(3),(4) (1988).

The findings and policies of these two federal acts are not based upon abstract conclusions that building on barrier islands like the Isle of Palms is dangerous to life and property and significantly damaging to the fragile beach/dune system. Like the findings and policies of the 1977 Coastal Zone Management Act and its Amendment, the 1988 Beachfront Management Act, these laws are based upon the hard lessons of experience. The impacts and dangers of constructing on barrier islands and near the ocean are well documented.

First, structures and their inhabitants near the ocean have high risk of serious threat due to erosion and storm events.

[25] *Id.* at 7-8; NOAA after careful investigation and public hearings concluded that it did not believe the Act constituted an unjust taking of property, at 7.

This is particularly true on barrier islands.[26] Indeed, Hurricane Hugo provided graphic evidence of the dangerous character of constructing and living on barrier islands.[27]

Secondly, hurricanes and storms cause manmade structures to be broken apart and these parts become projectiles that are carried by wind and wave. These projectiles, in some cases whole houses themselves, are carried onto other properties adjacent to and behind them. This creates significant peril to adjacent and nearby construction.[28]

Thirdly, the sewer lines and septic tanks for near shore homes are often severed or uncovered causing contamination of coastal waters and shellfish beds. Likewise, water lines rupture causing contamination of drinking water.[29] Further, other infrastructure such as roads, bridges and electrical lines are often seriously damaged as well.

Fourth, coastal property debris both on land and that washed into coastal waters hampers cleanup rescue and relief

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[26] Miller, "The Barrier Islands: A Gamble With Time and Nature", *Environment*, 6-9 (November 1981); Stauble, "Barrier Islands: Dynamic Coastal Landform Requiring Complex Management Decisions," *Barrier Islands: Process and Management* (1989) 63; National Research Council, "Managing Coastal Erosion" (1990) National Academy Press, 20; Neal and Pilkey, *Living with the S.C. Shore* (1984) Duke Univ. Press, 3-70, 93-94.

[27] Thieler and Young, "Quantitative Evaluation of Coastal Geomorphological Changes in S.C. After Hurricane Hugo. *Journal of Coastal Research*, Special Issue No. 8. (Spring 1991); Wang, "Water & Erosion Damage to Coastal Structures – S.C. Coast, Lessons of Hurricane Hugo" *Proceedings of the 1990 National Conference on Beach Preservation Technology* (February 1990); Stauble "Effects of Hurricane Hugo on the S.C. Coast," *Journal of Coastal Research*, Special Issue (Spring 1991).

[28] Katuna, "The Effects of Hurricane Hugo on Isle of Palms, S.C.: From Destruction to Recovery." *Journal of Coastal Research*, Special Issue No. 8 (Spring 1991); Coch and Woff, "Effects of Hurricane Hugo Storm Surge in Coastal South Carolina." *Journal of Coastal Research*, Special Issue No. 8 (Spring 1991).

[29] Cook, "Hurricane Hugo v. Critical Lifelines: Lessons Learned and Implications for the Future: *Hurricane Hugo One Year After*, (B. Sill and P. Sparks, Eds., 1990).

efforts. Evacuating individuals and rescue workers must contend with downed power lines and dangerous debris during their efforts in protecting life and property.[30]

Fifth, aside from the immediate harm that near shore construction can cause during erosion and storm events, the costs of cleanup, building emergency dunes, and sand nourishment associated with storms is significant.[31]

Finally, permanent construction, as that proposed by petitioner, close to the beach/dune system causes serious disruption to the equilibrium between sand and water. Even slight alterations to the beach/dune system can lead to significant disruption of the stability of the beach and exacerbate erosion. Near shore construction that affects this sensitive system soon becomes threatened and directly threatens their neighbors.[32]

Development on barrier islands such as the Isle of Palms magnifies the foregoing problems because their shorelines are generally unstable. As noted in the Coastal Barrier Resource Act of 1982, coastal barrier islands are clearly the most dangerous areas along the coast to build:

> Beaches, dunes, and entire islands erode and migrate as ocean currents, wind and waves undermine and move them. Storms can wipe out whole sections of beach when they are overwashed and can just as easily close inlets as sediments are redeposited. The sands of beaches continuously move and are redistributed. In response to a rising sea level (about one foot per century along the

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[30] *Id.*

[31] Rhodes, "Federal Emergency Work on S.C. Beaches Following Hurricane Hugo," *Beaches: Lessons of Hurricane Hugo* (1990)

[32] Clark, *Coastal Ecosystem Management: A Technical Manual for the Conservation of Coastal Zone Resources*, and other National Conservation groups, P. 318, 336, 566; Report of Barrier Island Work Group, U.S. Dept. of Interior (1978) pp. 16-17; Neal and Pilkey, *Living with the S.C. Shore* (1984) pp. 21-54 – For a more in depth look at issues raised in N. 26-32 see the Amicus Brief of Nueches County Texas, NRDC, *et al.*

> Atlantic Coast), these islands are generally migrating landward. The combination of erosion and migration, as well as the effects of flooding from hurricanes and other storms, make these areas especially hazardous places for permanent man-made structures and human habitation. S. Rep. No. 419, 97th Cong. 2d Sess. 1 (1982).

It is in this context that the state of South Carolina sought to amend its 1977 Coastal Zone Management Act. While the 1977 Coastal Management Act had as its purpose the protection of the beach/dune system and prevention of ill-planned development, it failed significantly in its ability to prevent such development from encroaching dangerously near the ocean. Construction could take place up to the trough of the primary oceanfront sand dune and where there was no such dune, landowners built literally up to the highest uprush of the waves where there was no vegetation. S.C. Code Ann. § 48-39-10(H) and (I). In 1986, the respondent appointed a Blue Ribbon Committee on Beachfront Management to investigate the problems of beach erosion and propose management solutions. During the deliberations of the committee several minor storms wreaked havoc upon the "Grand Strand" beaches of the state and brought home the extreme urgency of improving beach management. The committee, after noting the damage that the storms had caused, then proposed that the state should require retreat of existing structures from the shoreline over a thirty year period, limitation of new construction, particularly erosion control structures, and encouraged the state to develop a nourishment plan to provide sand to critically eroding beaches. (Report of S.C. Blue Ribbon Committee on Beachfront Management.)

The 1988 Beachfront Management Act expanded upon the Blue Ribbon recommendations but the same theme underlies the Act. The Act seeks to prevent ill-planned development near the shore. The legislature found that the 1977 Act "did not provide adequate jurisdiction to the South Carolina Coastal Council to enable it to effectively protect the integrity of the beach/dune system." Continuing, the findings state:

> Consequently, without adequate controls, development unwisely has been sited too close to the system. This type of development has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property. It is in both the public and the private interests to protect the system from this unwise development. S.C. Code Ann. § 48-39-250(4).

The 1988 Beachfront Management Act sought to prevent this beach management problem by retreat of existing structures over a forty year period, strict prohibitions on construction in high hazard areas and promotion of long-range planning and nourishment. *Id.* § 48-39-260. The South Carolina Supreme Court gave deference to the findings and policies of the Beachfront Management Act and the petitioner agreed with the importance of the Act. Therefore, it must be assumed that the construction proposed by petitioner represents "unwise development" that will jeopardize the stability of the beach/dune system, accelerate erosion and endanger adjacent property. *Id.* § 48-39-250(4). Limiting this unwise development prevents *misuse* of a fragile ecosystem that serves to contribute to shoreline stability and is unsuited in its natural state for construction.

2. Application Of The Act's Ban On The Construction of Permanent Structures On Petitioner's Property Prevents Serious Injury To Public Health And Safety And Physical Damage To Neighboring Properties

The evidence presented at trial graphically demonstrated that the construction of permanent structures on petitioner's property is the type of "ill-planned" development that the federal laws and the 1988 Beachfront Management Act seek to prevent because of the associated public harms.

According to the methodology utilized by the Act under section 48-39-280, the east end of Isle of Palms, including the two petitioner lots, is characterized as an unstabilized inlet zone. Tr. 72, Stip. No. 14. Within this zone the baseline is located at the most landward shoreline in the past forty years.

Tr. 79-80. Construction of habitable structures from a point twenty feet behind the baseline seaward to the ocean is prohibited. In the case of the two petitioner lots, the baseline fell on the road behind the lots and thus by statute, neither lot was deemed suitable for residential development. S.C. Code Ann § 48-39-250(4).

This location of the baseline and the conclusion that the area is unsuitable for building was supported by the shoreline change maps presented. (Exhibits 10-22) While the east end of this barrier island is generally accretional, the shoreline is subject to significant episodes of erosion and the shoreline has fluctuated greatly during the past forty years. Tr. 72-78. The two lots in question were entirely underwater in 1963, and as recently as 1973 the shoreline was even further landward and in fact, a pond formed over the two lots. See Exhibit 22, J. App. 9. Exhibit 22 shows the various shorelines that have developed along the petitioner's subdivision and conclusively shows the volatile and dangerous nature of the beach at Wild Dunes.

The volatility of the area is further demonstrated by the fact that during the 1980s the City of Isle of Palms and the Council granted permission to Wild Dunes to scrape sand and use sandbags to protect structures threatened by erosion. Tr. 98-101. In a further effort to protect against erosion, Wild Dunes received a permit for construction of a revetment to protect portions of the development. Tr. 101. Finally, in 1987, the development obtained a permit to renourish the beach with sand in order to protect the structures built during the late 1970s and 1980s. Tr. 101.

In spite of the forgoing efforts, the testimony is unrebutted that the area in question is still subject to severe erosion and further remedial action will be necessary to protect the structures along the front beach. Tr. 85. Further, the evidence conclusively shows that houses and other structures along the east end of the Isle of Palms will continue to be threatened in the future by erosion and storm events. Tr. 88. Indeed, this testimony was a prophetic statement of the damage wreaked by Hurricane Hugo shortly after this trial. See 31-33, *supra*.

The forgoing analysis is important because the petitioner seeks to characterize the purposes of the Act as promoting tourism and the state's economy. Pet. 38-41. While this is one of the incidental benefits, including recreation and habitat for flora and

fauna, the purpose of the Act is primarily directed at prevention of physical damage to the beach/dune system and prevention of public health and safety risks created by ill-planned development.

Consistent with his litigating strategy, the petitioner never made a serious effort to rebut the fact that this area was an unsafe area to build upon. He failed to challenge the location of the baseline pursuant to the administrative and judicial appeal provisions of the Act thereby conceding that the area was subject to serious bouts with erosion. Further, his own expert acknowledged the fact that the habitable structures in Wild Dunes were subject to serious threat of erosion in the mid 1980s. Tr. 20-21. Having failed to take the opportunity to avail himself of the administrative remedy, he should not be allowed to collaterally attack the facts to which he bound himself. See, e.g., *Callanan Road Co. v. United States*, 345 U.S. 507, 512-13 (1953) ("A direct attack in such circumstances was the remedy. . . . . [Appellant] cannot in this collateral proceeding attack the validity of the Commission's order . . . "); see generally *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 36 (1952); *McKart v. United States*, 395 U.S. 185, 193 (1969); Fuchs, *Prerequisites to Judicial Review of Administrative Agency Action*, 51 IND. L. J. 817, 859-870 (1976)[33]

3. The Kinds Of Harms Addressed By The Act Are Akin To Those That This Court Has Long Held May Adversely Affect And Even Virtually Destroy Property's Market Value Without Being An Unconstitutional Taking.

Contrary to the petitioner's claim and moreover, as supported by the forgoing discussion in Part IIB (page 18, *supra*), the kind of harms that the Beachfront Management Act seeks to prevent are those that can defeat a takings claim even where there has been a virtual destruction of the economic value of a piece of property. The purposes of the Act and its application to petitioner's property

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[33] Were the rule otherwise, a litigant could, as petitioner attempts to do here, avoid limiting judicial review of an agency determination to the record before the agency. By filing a lawsuit, the party would circumvent the normal process of administrative appeal, followed by judicial review based on the agency record, and instead obtain a court's *de novo* review of the agency decision.

implicate the core police power concerns that this Court in *Mugler* and its progeny and state courts since *Commonwealth v. Alger*, have long recognized cannot be validly deemed to "take" property when they merely prevent its injurious use.

Perhaps most significantly, the kinds of risks redressed by the Act are quite analogous to risks that historically have been enjoinable at common law as nuisances and when realized, been the basis of successful damage actions sounding in tort.[34]

Thus courts have declared that a landowner may not prevent surface waters from naturally entering his property where the effect of that physical impediment is to redirect those waters to neighboring properties where physical harms result. *Cox v. Cambridge Square Towne Houses*, 236 S.E.2d 73 (GA 1977); *Hurdman v. North Eastern Railway Co.*, L.R. 3 CPD 168 (CT App. 1878) And

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[34] This is not to suggest, of course, that an activity must be precisely equivalent to a traditional common law nuisance to defeat a takings claim brought against a law of general applicability. The reasons why were well explained by Chief Justice Shaw in *Commonwealth v. Alger*:

> The reason why it is necessary to have a certain and authoritative law, is shown by the difficulty, not to say impracticability, of inquiring and deciding as a fact, in each particular case, whether a certain erection in tide water is a nuisance at common law or not. . . . It is this consideration, (the expediency and necessity of defining and securing the rights of the public,) which creates the exigency, and furnishes the legislature with the authority to make a general and precise law. . . .

61 Mass. at 104; see *id.* at 96-97 ("The tradesman needs to know, before incurring expense, how near he may build his works without violating the law or committing a nuisance . . . ").

It is, of course, also equally true that police power measures that are not intended to redress nuisance-like activities may nonetheless not be deemed takings based on consideration of this Court's three-factor inquiry. See, *e.g.*, *Penn Central Transportation Co. v. City of New York* and *Keystone Bituminous Coal Co. v. DeBenedictis*.

See as well, *Camfield v. United States*, 167 U.S. at 523 ("ever since *Aldred's Case*, 9 Coke 57, it has been the settled law of the country and of England, that a man has no right to maintain a structure upon his land which . . . renders the occupancy of adjoining properties dangerous, intolerable, or even uncomfortable to its tenants. No person maintaining such a nuisance can shelter himself behind the sanctity of private property.")

in those cases where the landowner has nonetheless done so and harms resulted, the courts have awarded damages. *Tetherington v. St. Louis T.E.R. Co.*, 80 N.E. 697 (1907); *Braverman v. Eicher*, 238 N.W. 2d 331 (1976); *Cox v. Cambridge Square Town Houses Inc.*, *supra*.

Courts have similarly ruled that actions on a landowner's own property that have, due to the dynamic nature of the soil in the area, caused subsidence on neighboring property may amount to an actionable nuisance. (*Knapp v. Ciricco*, 133 N.Y. Supp.2d 356 (1954); *Friendship Dev. Co. v. Smith-Southwest Industries, Inc.*, 576 S.W. 2d 21 (1978); *Henderson v. Wade Sand & Gravel Co. Inc.*, 888 So.2d. 900 (1980). Landowners have also been barred from and ordered to pay damages for disposing of pollutants in a manner that harms neighboring property. *Branch v. Western Petroleum, Inc.*, 657 P.2d 267 (1982); *Wood v. Picillo*, 43 A.2d 1244 (1982). There are not surprisingly even cases where the landowners have been barred (or required to pay damages) under a nuisance theory for constructing erosion control devices because of the resulting harm to adjacent property owners. *Lummis v. Lilly*, 429 N.E. 2d 1146 (1982)[35]

Importantly, in none of these instances, is there a defense that the activities creating such threats are confined to the defendant's property in the first instance. That fact merely

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[35] Although filing in support of petitioner, the amicus brief prepared by Professor Richard Epstein on behalf of the Institute for Justice, recognized this common law limitation. See Amicus Br. Institute for Justice 21 ("The normal ebb and flow of the tides are allowed to do their work. The construction of massive bulwarks on the beach will starve it of new sand and cause material physical damages to the beach and its long term health."). Having properly acknowledged the scope of the common law tort limitations on property rights, however, amicus offers no more than its own ipse dixit as to why it is ready to second guess respondent's technical determination that the construction of permanent structures in that same area may cause similar harm. The analogy to common law nuisance plainly does not depend on whether the structure to be built is the same that might have been built hundreds of years ago. It instead depends on the kind of injury and the causal mechanism for its creation.

prevents the activities from amounting to a physical trespass and certainly does not mean that no nuisance has occurred.

B. Any Investment-Backed Expectations Of Petitioner's That Are Adversely Affected By The Development Restriction Were Not Reasonable In Nature

A second factor that the Court looks to in determining if a police power restriction on the use of private property equates to a taking is whether the regulation interferes with reasonable investment-backed expectations. (*Keystone Bituminous*, 480 U.S. at 495, citing *Kaiser Aetna*, 444 U. S. 164, 175 (1979); see page 27, *supra*). If the right to realize the most profitable use of one's property or to build on one's property were absolute, compensation would be required in every case. Similarly, if the "reasonableness" of a property owner's expectation was based upon his investment of large sums of money, by doing so he could effectively insulate an injurious use of his property from regulation. As discussed below, petitioner had no "reasonable" investment-backed expectations.

1. Whether the petitioner's investment-backed expectations are reasonable is closely linked to the character of the governmental action. Here, the government action seeks to prevent construction that has serious public health and safety implications (see pages 28-37, *supra*). The common sense notion that property owners can have no reasonable expectation to use or develop their property in a manner that will cause such harm to others is effectively compelled by this Court's decision in *Mugler* and the long line of cases both before and since that have held that such police power measures do not "take" property, within the meaning of the Takings Clause. See *Keystone Bituminous*, 480 U.S. at 491-93.

Two more recent decisions of this Court, in particular, undermine the reasonableness of any investment-backed expectations that petitioner might claim. In *Ruckelshaus v. Monsanto*, this Court held that "absent an express promise" from the government, "Monsanto had no reasonable investment-backed expectations that its [trade secret] information would remain inviolate in the hands of EPA." 467 U.S. 986, 1008 (1984). This was so, according to the Court, although EPA had no practice of disclosing that information to others at the time that Monsanto submitted its trade secret information to EPA and "neither [the Federal Insecticide Fungicide, Rodenticide Act] nor any other provision of law gave EPA authority to disclose data obtained from Monsanto" at the time of its submission to the agency. *Id.* By contrast, because the Court found that Monsanto had during a subsequent time period (between October 22, 1972, and September 30, 1978) submitted additional trade secret information based on explicit statutory guarantees of its nondisclosure, the Court concluded that the application to those submissions of the subsequently-enacted federal statutory requirement of disclosure would amount to an unconstitutional taking in the absence of "just compensation." See *Id.* at 1010-1013.

Contrary to petitioner's apparent assumption, the mere purchase of property under an existing zoning ordinance provides no analogous guarantee. The existing law simply announces the lawfulness of current practices. It offers no guarantee that the law will not need to change in the future. Hence, only when, unlike in this case, the landowner has further invested in the property and expended substantial sums to develop it consistent with existing land use ordinances, does the takings clause further restrict the state's ability to apply any subsequent changes in the ordinances retroactively to those pre-existing uses.[36] And where, as here, there was neither an explicit governmental guarantee of no change in policy nor further investment by petitioner to develop the land consistent with the law existing at the time

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[36] That is also the very reason why petitioner's further complaint here regarding the existence of other homes on similarly situated adjacent lots is wholly misguided. Those homes predated the enactment of the 1988 law. The distinction about which petitioner complains, therefore, is precisely the one supported by the Constitution. That is not, of course, to suggest that police power measures can never restrict existing uses, but that issue is not presented in this case. See generally, Noel, Retroactive Zoning and Nuisances, 41 COLUM. L. REV. 457 (1941).

of purchase, petitioner's expectations that the law would not change were not reasonable.

As explained by the Court in *Monsanto*, this is especially so in an area, like coastal zone protection, "that has long been the focus of great public concern and significant government regulation." *Id.* at 1008-09. The expectancy reasoning of *Monsanto* should be applied here because regulation of land use, like pesticide use, is a legitimate subject for government regulation to prevent injury to the public. Great harm could be derived by uncontrolled use of either. Further, loss of government largesse can be equally devastating to the property owner as those who own real property. In the final analysis, there is no inherent difference in the social impacts or private impacts implicated by the regulation of either type of property interest.

This Court's more recent decision in *Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211 (1986), likewise suggests the unreasonableness of petitioner's investment-backed expectations. There, the Court rejected a takings claim by employers based upon a governmental requirement that the company had to make payments to pension plans when withdrawing from the plan. The Court concluded that no taking had occurred despite the fact that it upset otherwise settled expectations. *Id.* at 223. As with other economic property cases, the Court found that it merely adjusted the benefits and burdens of economic life so as to promote the common good rather than physically invading or permanently appropriating the assets. *Id.* at 225. The Court stated that "[o]ur cases are clear that legislation that readjusts rights and burdens is not unlawful solely because it upsets otherwise settled expectations." *Id.* at 223. And, of particular pertinence to this case, the Court stressed that " '[t]hose who do business in the regulated field cannot object if the legislative scheme is buttressed by *subsequent amendments* to achieve the legislative end.' " *Id.* at 227, quoting *FHA v. The Darlington, Inc.*, 358 U.S. 84, 91 (1958) (emphasis supplied).

2. The record in this case, moreover, leaves no doubt that petitioner's investment-backed expectations were unreasonable. Petitioner purchased the property in December 1986,

and had been intimately associated with the property in the early 1980s in his capacity as a contractor for the development in that area. Tr. 34-40. He was, as a result, "very knowledgeable" about the property that he purchased. Tr. 37. Petitioner therefore had no reasonable investment-backed expectation that no restrictions would be placed on his building upon his property. His property is located in an area marked by shifting sands and thus subject to ongoing serious threats of erosion.

At trial, petitioner acknowledged that he knew that the property had suffered episodic erosion in the 1980s. Tr. 52-53. He sold lots, and was intimately involved in the affairs of Wild Dunes during the severe erosion periods between 1983 and 1987. His engineer acknowledged erosion was a problem and certainly the remedial efforts of scraping sand, using sandbags, building revetments and renourishing shows the seriousness of the problem. Petitioner also had reason to know prior to his purchase that this kind of property was subject to strict governmental regulation. The 1977 South Carolina Management Act, while less strict then the subsequently-enacted 1988 Act, certainly placed prospective property owners on notice of the nature of the harms of development adjacent to the shoreline and the potential for future restrictions. In fact, respondent appointed a Blue Ribbon Committee on Beachfront Management to investigate the problems of beach erosion and propose management solutions in 1986, prior to petitioner's purchase in December of that same year. The South Carolina Legislature enacted the 1988 Act that petitioner challenges approximately nineteen months after his purchase.

Petitioner also had reason to know at the time of purchase that the government could validly restrict uses of land that, because of their unique physical characteristics, threatened to cause physical injury to others. Two years prior to petitioner's purchase and at a time when petitioner was actively involved in developing coastal properties, the South Carolina Supreme Court in *Carter v. South Carolina Coastal Council*, 314 S.E. 2d 327 (SC 1984), recognized the unique physical characteristics of wetlands and concluded on that

basis that there was no compensable taking of private property where the state refused to allow traditional filling of saltwater marsh. *Id.* at 329. The parallel is clear. Petitioner's property, like that at issue in *Carter*, is unsuited in its natural state for the construction of certain structures. In each context, such construction threatens to cause physical harm to others and to their property.[37]

3. Finally, various environmental decisions that have been made by state courts offer a clue as to the justified expectations of the petitioner. There has developed a clear judicial recognition that certain types of real property are of such a natural character that there is no reasonable investment-backed expectation that can exist for development. (See cases cited in N. 37, *supra.*) This means of course that such property is held by the owner with the implied obligation that it not be used in a way that is inconsistent with its natural state or harms others. The leading case recognizing this principle is *Just v. Marinette County.*

In the *Just* case, Marinette County passed a shoreline zoning ordinance that required that the Justs obtain a conditional use permit to fill certain wetlands that they owned. The owners alleged that the prohibition on filling wetlands was an unconstitutional taking. The Court, in rejecting this limitless expectation on the part of the property owner to use his property, made the now classic statement:

> An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it is unsuited in its natural state and which injures the rights of others. . . .

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[37] The South Carolina Supreme Court is not alone in its reasoning, which has been embraced by many state supreme courts faced with a comparable takings challenge. See, e.g., *Just v. Marinette County,* 201 N.W. 2d 721 (U.S.C. 1972); *Orion Corporation v. State,* 747 P. 2d 1062 (1987); *Rowe v. Town of North Hampton,* 553 A. 2d 1331 (N.H. 1989); *Presbytery v. King County,* 787 P. 2d 907 (Wash. 1990) cert. denied, 111 S. Ct. 284, 112 L. Ed. 2d 238 (1990).

> . . . The changing of wetlands and swamps to the damage of the general public by upsetting the natural environment and the natural relationship is not a reasonable use of that land . . . (at 768)

In *Carter v. South Carolina Coastal Council,* 314 S.E. 2d 327 (SC 1984), the South Carolina Supreme Court adopted this principle and denied that there was a compensable taking of private property where the state refused to allow traditional filling of saltwater marsh. *Id.* at 329. Just as there can be no justified expectation to build on marsh land unsuited in its natural state for construction of a home, there has now developed a conscious social awareness that certain beachfront property in many instances is unsuitable in its natural state for construction. Given the facts of this case, petitioner had no *reasonable* investment-backed expectation that he should be allowed to build upon his property. Since he has not challenged the location of the baseline and conceded the general fragility of the area in question, he can not argue that his expectation to build is reasonable any more than a person can now claim it is reasonable to build on marsh. See *Presbytery v. King County,* 787 P.2d 907 (Wash. 1990), cert. denied, 111 S. Ct. 284, 112 L. Ed. 2d 238 (1990). (Where a County Ordinance prohibited all construction on several wetland lots on the Plaintiff's land. The Presbytery Court observed that if a regulation protects the public from harm, does not infringe upon the right of the land owner to possess, exclude others, and dispose of the property, no taking has occurred.)

4. In view of the *Mugler* line of cases including its most recent reaffirmance in *Keystone,* the principles set forth in *Monsanto* and *Connolly,* petitioner's knowledge of erosion and failure to challenge the location of the baseline, together with the assumed unsuitability of the beach for construction, petitioner has no justified expectation to build on these lots.

C. Petitioner's Property Retains Substantial Economic Value Notwithstanding The 1988 Act's Bar On The Construction Of Permanent Structures

The final factor in a proper takings analysis is the extent of the reduction in the economic value of petitioner's

property. While the trial court found the property to be worthless, that finding was not reviewed by the S.C. Supreme Court. Respondent also believes that such a finding was not necessary given petitioner's litigation theory, but if this Court deems reduction in value is relevant, the case must be remanded to the S.C. courts for further proceedings on that issue.[38] However, it remains evident that the beachfront lots retain substantial value and use and that, under established precedents, no taking of petitioner's property has occurred.

This Court has repeatedly recognized the multifaceted concept of property ownership in its frequent references to the full "bundle" of property rights. (See, e.g., *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 130-131 (1978); *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979), see also, Michelman, "Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation Law'," 80 Harvard L. Rev. 1165, 1230-1233 (1967).) The Court's takings jurisprudence has consistently reflected the principle that government's denial of but one "strand" of the

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[38] The trial court's purported finding that the 1988 Act deprived petitioner's property of all economic value is not binding on this Court. That finding was based on the erroneous legal proposition that the value of the property necessarily depended on its being utilized for the most intensive use reasonably possible (i.e., residential development). See App. 37. Neither petitioner's appraiser nor the trial court therefore took into account the market value of the property for other, albeit less profitable, uses of the parcels.

In any event, the South Carolina Supreme Court should in the first instance have the opportunity to review the merits of the trial court's finding on economic value. For the reasons previously described (see pp. 12-27, *supra*, that court had no need to review the finding of value because it was required only to consider petitioner's threshold contention that the character of the governmental action was irrelevant to the proceedings. Had petitioner contested the character of the restriction, the South Carolina Supreme Court might well have had reason to review the trial court's finding regarding economic impact. We believe that the state supreme court would likely have concluded that the trial court's finding was clearly erroneous based on the record before it. But in no event should this Court itself make a final determination that a taking occurred, based on that trial court finding, without first providing the state supreme court a meaningful opportunity to review the economic impact finding for itself.

bundle does not rise to the level of a compensable taking. This is because the aggregate property interest must be viewed in its entirety. (E.g., *Andrus v. Allard, supra*, 444 U.S. at 65; *Penn Central, supra*, 438 U.S. at 131; *U.S. v. Twin City Power Co.*, 350 U.S. 222, 227-228 (1956).

This analytical framework is dispositive here in light of the dual facts that: (1) petitioner has not lost the use of his property; and (2) the economic impact of the 1988 Act has consequently and necessarily been to result in a less than total diminution in value.

1. Turning to the first point, petitioner offered no evidence below that all use of his property was denied as a result of the 1988 Beachfront Management Act. Nor could he. Under the statute, petitioner retains exclusive physical access to the property, which abuts the publicly-owned tidelands. He retains the right to exclude others, the right to make passive and recreational use of the parcels and the right to alienate the property. The record below reflects these opportunities. Tr. 97-98.

To be sure, the parcels would be worth more if permanent, habitable structures were allowed upon them.[39] But even with the 1988 Act's restrictions, the property remains extremely valuable for purposes short of permanent, residential development.

For example, a substantial economic value would attach to such rights in conjunction with ownership of an adjacent parcel (e.g., landward of the setback line) on which the owner could build a dwelling. The owner of such an adjacent parcel would place significant economic value on ownership of the lot closer to the shore, notwithstanding the setback requirement.[40] This is because ownership of that additional parcel would enhance the value of the whole by adding significantly

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[39] As discussed at pp. 8-12, *supra*, the possibility of that opportunity now exists – by virtue of the 1990 amendments to the Act.

[40] An economically viable "use" necessarily includes the ability to sell property to a third person who is willing to purchase that property because of its value to him or her. See *Andrus v. Allard*, 444 U.S. at 64. Were the rule otherwise, the takings inquiry would turn on the subjective vagaries and objectives of the particular owner rather than the market's ability to dictate objectively-viable uses.

to the privacy, serenity and exclusivity of the aggregate area. Indeed, it was just such attributes that rendered so valuable the beachfront at issue in *Nollan v. California Coastal Commission*, 483 U.S. 843 (1987), and made the requirement of public access to it an unconstitutional taking. Certainly the Court in *Nollan* never doubted the significant economic value of the discrete segment of beachfront property lying between the Nollan's home and the shore, notwithstanding the fact that there were no permanent structures on it or, presumably, permitted to be built on it.[41]

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[41] Petitioner's circumstances are very similar to that of the property owners in *Andrus v. Allard*. In that case, federal law denied the owners of certain avian artifacts, the right to sell and earn a profit from those items. Noting that the regulations challenged did not compel the surrender of the artifacts, and that there was no physical invasion or non-commercial restraint upon them, the Court stated "the denial of one's traditional property rights does not always amount to a taking." 444 U.S. at 66. Like in this case, the property owners in *Allard* were denied the opportunity to use their property in a way which would maximize the property's economic value: "It is, to be sure, undeniable that the regulations here prevent the most profitable use of appellees' property. Again, however, that is not dispositive." 444 U.S. at 67. Faced with a diminution in value and loss of the use in *Allard* at least as significant from a percentage standpoint as in the present case, the Court rejected the takings challenge, justifying the severe restriction by stating: "It is true that the appellees must bear the costs of these regulations. But, within limits, that is a burden borne to secure 'the advantage of living and doing business in the civilized community.' " 444 U.S. at 67 quoting from *Pennsylvania Coal Co v. Mahon*, 260 U.S. 393, 422 (1922).

The instant case is also closely analogous to that of *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 258 Cal. Rpt. 893 (Cal. App Dist. 1989). On remand from this Court, the California Court of Appeal recognized the fact that the most intensive commercial use of property is not the *only* use to be considered under the Takings Clause. Determining that the land use ordinance in question did not deny the landowner all use of his property despite the fact that it could not reconstruct permanent structures demolished during a flood, the court concluded that "as far as this ordinance is concerned, many camping activities could continue on this property. Meals could be cooked, games played, lessons given, tents pitched." *Id.* at 902.

2. Given the substantiality of the uses remaining to petitioner under the 1988 Act, petitioner's claim that his property lacks positive market value is simply incredible. At trial, petitioner steadfastly ignored the possibility that the property might have some use other than for the construction of permanent residences. His entire case was predicated upon a market analysis based exclusively upon use of the property for the construction of single family homes.[42] He failed to consider the suitability of the property for the less-intensive uses described above, which provide the property with substantial market value (see, e.g., Tr. 117, 122).

Of course, petitioner's use or sale of the property for such purposes would yield economic benefits significantly less than those of the lots if residential construction were permitted. However, the Court has often observed that " '[a]lthough a comparison of values before and after' a regulatory action is relevant, . . . it is by no means conclusive . . . " *Keystone, supra*, 480 U.S. 470, 490, citing *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962). The Takings Clause does not guarantee owners of private property that regulations will not reduce the value or eliminate the most valuable use. *U.S. v. Eureka Mining Co.*, 357 U.S. 155, 168 (1958); *Kirby Forest Industries, Inc. v. U.S.*, 467 U.S. 1 (1981); *Andrus v. Allard*, 444 U.S. at 66; *Goldblatt v. Town of Hempstead*, 369 U.S. at 592. Nor does the Constitution guarantee a profitable use, when that profit would be realized by imposing risks to public health and safety, or creating physical injury to other person's properties.

Applying these principles to the present case, petitioner has not been deprived of all economic use of his property. First, there has been no total loss of use of the property at issue; rather, only one aspect of one strand of petitioner's "bundle of rights" has been affected. Second (and as a corollary of the fact that petitioner retains substantial uses of his property), the economic value of petitioner's property has not been eliminated. But, in any event, even assuming that the

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[42] Petitioner's appraiser testified at trial that he had not investigated any possible property value other than that related to construction of single family homes on the property. Tr. 54-55.

market value of petitioner's property has been severely eroded, no taking has occurred because those more profitable uses would have threatened public health and safety as well as the physical integrity of the property of others.

CONCLUSION

The petition should be dismissed as improvidently granted or the case should be remanded for further proceedings below to allow the state courts to consider petitioner's temporary takings claim in the first instance and to allow petitioner to apply for relief under the 1990 Amendments. Alternatively, the judgment of the South Carolina Supreme Court should be affirmed.

Respectfully submitted,

C. C. HARNESS, III
Counsel of Record
General Counsel for
Respondent
South Carolina Coastal
Council
4130 Faber Place, Suite 300
Charleston, SC 29405
(803) 744-5838

T. TRAVIS MEDLOCK
Attorney General for the
State of South Carolina
KENNETH P. WOODINGTON
Senior Assistant Attorney
Rembert C. Dennis Office
Building
P.O. Box 11549
Columbia, SC 29211
(803) 734-3970

Richard J. Lazarus
Of Counsel
Washington University
School of Law
1 Brookings Drive
St. Louis, MO 63130
(314) 935-6495

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In The

Supreme Court of the United States

October Term, 1991

DAVID H. LUCAS,

Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

On Writ Of Certiorari To The Supreme Court Of The State Of South Carolina

REPLY BRIEF ON THE MERITS

A. CAMDEN LEWIS
Counsel of Record
LEWIS, BABCOCK & HAWKINS
1513 Hampton Street
P.O. Box 11208
Columbia, South Carolina 29211
(803) 771-8000

GERALD M. FINKEL
Attorney for Petitioner
FINKEL, GOLDBERG, SHEFTMAN & ALTMAN
P.O. Box 1799
Columbia, South Carolina 29202

DAVID J. BEDERMAN
Of Counsel
Emory University School of Law
Gambrell Hall
Atlanta, Georgia 30322

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY BRIEF ON THE MERITS

Pursuant to Supreme Court Rule 24.4, the Petitioner, David H. Lucas, respectfully submits this Reply on the Merits.

ARGUMENT

I. THIS MATTER IS RIPE FOR ADJUDICATION.

Respondent, South Carolina Coastal Council, maintains, Resp. Br. 8-12, that Petitioner has failed to exhaust administrative remedies available to him, and, as a consequence, this matter is not ripe for adjudication. More specifically, Respondent claims that section 48-39-290(D)

of the South Carolina Beachfront Management Act ("the 1988 Act"), S.C. Code Ann. § 48-39-10 *et seq.* (Law Co-op. 1990) (reprinted at Pet. App. 125), adopted in June 1990, provides the Petitioner with the possibility of seeking a special permit from the South Carolina Coastal Council at any time.[1] The United States apparently agrees. U.S. *Amicus* Br. 8-10. Petitioner respectfully maintains, however, that this argument is without substance.

1. The entire posture of this case has been dictated by the trial court's finding that the South Carolina 1988 Act had worked a total and *permanent* taking of the Petitioner's property. Presiding Judge Patterson of the Circuit Court of Charleston County found that the South Carolina Coastal Council's regulation against building went into effect against Mr. Lucas's property sometime after July 1, 1988. *See* Common Pleas Order, at 3, *reprinted at* Pet. App. 35. Judge Patterson also found that the prohibition of construction on Mr. Lucas's property was *permanent*. *Id.* at 5, *reprinted at* Pet. App. 37. This finding of fact was not disturbed on appeal. *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 896 (S.C. 1991).

As has already been noted, Pet. Br. 28 n.5, the South Carolina Supreme Court, in rendering its judgment in this case of February 11, 1991, did not need to consider the impact of the 1990 amendment.[2] The South Carolina

[1] Respondent does concede, Resp. Br. 9 n.4, that no other administrative remedy was previously available to the Petitioner.

[2] The majority in *Lucas* was, otherwise, clearly aware of the 1990 Amendments. *See Lucas*, 404 S.E.2d at 896 n.2.

Coastal Council sought to brief this issue, but its request was denied by that court. Resp. Br. 5, 9. By deciding the merits, the South Carolina Supreme Court implicitly held that Mr. Lucas had a ripe claim for compensation under the Constitution's Fifth Amendment.

2. Any alleged administrative remedy granted in the 1990 Amendments was inadequate and unavailable. Recourse to it would have been futile. The 1990 Amendments allowed an aggrieved property owner to seek a special permit from the Council in order to build or rebuild a structure seaward of the baseline. 1990 Amendments, § 3, *codified at* S.C. Code Ann. § 48-39-290(D)(1). A property owner, in applying for a special permit, covenants to remove the offending structure if the Council in its unfettered discretion determines it is "detrimental to the public health, safety or welfare." *Id.*

The Respondent has consistently made clear that it would not grant a permit to the Petitioner. Tr. 108-09, J.A. 7. The Respondent also stipulated that "any application for a permit to build would have been denied." Stipulation ¶ 16, J.A. 16. Respondent has nowhere suggested how the 1990 Amendments would have resulted in a change of heart for the permitting authorities, or would have mandated any action different from that announced by the Council in 1989. The law of this case is that Lucas will get no permit and the Act has resulted in a *permanent* taking. In short, Respondent's claim that Mr. Lucas should now apply for a permit, in order to be eligible for judicial review, is rather disingenuous.

To withhold compensation in this case, the majority of the South Carolina Supreme Court held that for Lucas

to build his home would be detrimental to the public health, safety, and welfare. *See Lucas*, 404 S.E.2d at 898. Respondent has strongly argued this same point. Under the 1990 Amendment, in this case's present posture (the lower court having found that to build would be a "great public harm"), Respondent would have to tell Lucas to tear down any house built under such a special permit.

This Court has consistently held that lack of finality will not be found where the purported administrative remedy is inadequate. *See Gibson v. Berryhill*, 411 U.S. 564, 575 (1973) (hearings before state regulatory board); *McNeese v. Board of Education*, 373 U.S. 668, 674-75 (1963) (civil rights case); *Union Pacific R. Co. v. Weld County*, 247 U.S. 282, 287 (1918) (collection of illegal tax). There is also a collateral notion that where recourse to administrative remedies would be futile, the case remains justiciable. *See Monongahela Connecting R. Co. v. Pennsylvania Public Utility Comm'n*, 373 F.2d 142, 146 (3d Cir. 1967) (challenge of railway regulation); *Collin v. Smith*, 447 F. Supp. 676, 683 (N.D. Ill.) (attempts to seek parade permit were futile), *aff'd*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978); *City of Altus v. Carr*, 255 F. Supp. 828, 833-34 (W.D. Tex.) (regulation of groundwater mining by special legislative leave), *aff'd*, 385 U.S. 35 (1966).

3. Ripeness rarely presents a definitive bar to jurisdiction, and this Court has acknowledged that what must be "evaluate[d] [is] both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967) (described in *Pacific Gas & Elec. Co. v. State Energy Comm'n*, 461 U.S. 190, 201 (1983),

as the Court's "leading discussion" of the ripeness doctrine). There is no question that Mr. Lucas has been denied compensation under every relevant theory. The South Carolina Supreme Court's nuisance reasoning is as applicable in denying that a compensable temporary taking occurred as it is to a permanent taking. This is not, therefore, a case in which "further proceedings are necessary to resolve the federal question whether there has been a taking at all." *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 633 (1981).[3]

If there is further fact-finding to be done on the temporary taking issue, it would be solely limited to the proper level of just compensation due to the Petitioner. Respondent is correct in noting that the Council did reserve at trial the right to further litigate this aspect of the temporary takings question. But this question is quite distinct from the ruling, already made by the South Carolina Supreme Court, that there was no compensable taking here because Mr. Lucas's intended use of his land amounted to a public hazard. This was the issue presented to this Court.

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[3] None of the cases upon which Respondent relies, Resp. Br. 8-12, *Agins v. Tiburon*, 447 U.S. 255 (1980); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *McDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986), involved situations in which the law was changed after a period in which a taking indisputably occurred. They all concerned the quite different circumstance in which a temporary claim was brought while the process of government decision-making about the subject property was still continuing.

II. PETITIONER'S *PER SE* RULE IS THE PROPER RULE FOR TOTAL TAKES.

The question for determination by this Court remains whether the government can so fully regulate land in a way that prevents all viable economic use or value, and still evade just compensation under the Fifth Amendment merely because the regulation is made pursuant to legitimate police powers.[4] The South Carolina Supreme Court has succeeded in insulating from a takings challenge *all* land-use regulations properly based on police powers. The crux of Petitioner's submission to this Court is that this result overturns *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), and returns us to a time when regulations of property were not subject to Just Compensation claims under the Fifth Amendment. This cannot be the law of the land.

Petitioner properly relied on the recent statements of this Court saying that if a regulation "denies an owner economically viable use of his land" that it constitutes a taking. *Agins v. Tiburon*, 447 U.S. 255, 260 (1980); *see also Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 295-96 (1981). We have here the admittedly rare case of a total taking by regulation of the "economically viable use" of land. The trier of fact so

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[4] The Petitioner does not and has never challenged the State's exercise of its police power. But in foregoing this challenge, Petitioner does not concede that the South Carolina Supreme Court correctly identified "the character of the government's actions."

found, and the South Carolina Supreme Court upheld that finding. It was, indeed, essential to the South Carolina Supreme Court's holding that it made absolutely no difference how much value was taken from the land, because any beneficial use of the property was harmful to the public. *Lucas*, 404 S.E.2d at 900-01.

Hard as Respondent tries in arguing the contrary, there is no real dispute in this case that all of Mr. Lucas's economically viable use and value of his land was taken by the operation of the 1988 Act. The trial court found that Mr. Lucas's property was suitable for the purpose it was intended under existing land-use regulations: the construction of homes. *See* Common Pleas Order, at 1-2, *reprinted at* Pet. App. 33-34. The trial court found that the 1988 Act worked a permanent and total taking, thus frustrating Mr. Lucas's legitimate, investment-backed expectations. Respondent attempts to relitigate these findings. Resp. Br. 40-50. The South Carolina Supreme Court chose not to do so and there is no reason for this Court to do so either.

Petitioner's *per se* rule is a sensible rule of decision precisely because it is premised on a finding that there has been a total or virtual taking of the economically viable use or value of real property.[5] It is nearly

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[5] The contention made by Respondent, Resp. Br. 45-50, and some of its *amici*, *see, e.g.*, National Growth Management Leadership Project *Amicus* Br. 17-21, that there is a distinction to be made in this case between the residual value of Mr. Lucas's property and its unregulated uses, is frankly laughable. Once again, the trial court found, despite Respondent's evidence to the contrary, that there had been a total take here.

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impossible to imagine a case where the only beneficial or economically viable use of land was a noxious, harmful use. By its very nature, real property is almost invariably susceptible to a variety of uses, and this fact distinguishes land from other forms of property. Moreover, unless the noxious use of land was recently proscribed, it would be impossible for the claimant to prove a total diminution in value. In cases where there has been a radical change in policy towards certain land uses and that land is so restricted as to eliminate any economically viable use by the owners, Petitioner maintains that the public as a whole must bear the cost of the new socially-decided preference.

III. ANY EXCEPTION TO THE TAKINGS GUARANTEE MUST BE NARROW AND SEVERELY CIRCUMSCRIBED.

If the Court chooses not to adopt the rule of decision suggested in total taking cases, there remains the corollary of Petitioner's submission. In order to dispose of the case, the South Carolina Supreme Court qualified all police power regulations as directed against public harms, in order to insulate them from takings challenges

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The reason why courts often look to the fair market value of property (before and after a regulation) is because it is the single best measure of the "economically viable" use of land. After all, as Lord Coke "long ago said, 'What is land but the uses thereof?' " *The People v. Kerr*, 37 Barb. 357, 399 (N.Y. App. Div. 1862). All attempts by Respondent to enter into evidence any residual value amounts were excluded by the trial judge as speculative. Trial Tr. 150.

under a "nuisance" exception.[6] Petitioner has asked this Court to hold that such a facile determination empties the Just Compensation Clause of all meaning.

No matter which standard is used to define a "taking," the facts of this case remain constant. Mr. Lucas has two vacant lots and on each side, in this alleged danger area, are homes. Up and down the beach are houses and condominiums built just as Lucas would build his home. Under Respondent's and its *amici's* theory, Mr. Lucas cannot build any structure because of its alleged potential danger, while the other structures are allowed to stay. All the similar structures have to be a nuisance under Respondent's theory. The reasoning of Respondent and its *amici* would, in effect, allow the state to clear the beach. Without an "objective and non-manipulable" definition of a nuisance, "the police power would swallow the Just Compensation Clause." U.S. *Amicus* Br. 18.

For argument's sake, Petitioner has attempted to elucidate such a standard by a two-prong test. Pet. Br. 37-45.[7]

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[6] The so-called nuisance exception is more properly described as a conflict of rights exception. *See Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Mugler v. Kansas*, 123 U.S. 623 (1887). *See generally Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 144-46 (1978) (Rehnquist, J., dissenting).

[7] A very good argument can be made that the only time a state can eliminate property rights without paying compensation is when there is a conflict in the property rights held by adjacent landowners. Consider the difference in results between the Court's decision in *Miller v. Schoene*, 276 U.S. 272 (1928), and its decision in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). In *Miller*, the State restricted the rights of

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The first inquiry is whether the danger being addressed is of a magnitude and imminence to consider any categorical denial of compensation.[8] The second condition is that the land-use regulation's primary purpose must be directed against a present danger, and not to bestow a benefit upon the public.

The fundamental premise of the first inquiry is that the government must clearly and convincingly demonstrate that a particular land-use activity poses such an imminent and compelling danger to public safety that its regulation amounts to a public necessity. Petitioner agrees with the Solicitor General that the best common law analogy for circumstances warranting government action without compensation lies in the realm of public necessity. *See* U.S. *Amicus* Br. 13-14.

(Continued from previous page)

landowners to grow cedar trees in order to prevent cedar rust from infecting nearby apple orchards. The *Miller* Court upheld the measure against a takings challenge. In *Pennsylvania Coal Co.*, the state restricted the coal companies' right to mine the support coal in order to prevent the collapse of buildings and homes overlying the coal mine. In *Pennsylvania Coal Co.* the Court struck down the measure as a taking.

[8] Respondent in its Brief vainly attempts to balance three criteria: (1) Economic Impact, (2) Character of the Government Action and (3) Reasonableness of investment-backed expectations. No one can seriously question that the economic impact on Lucas is a decrease in value from one million dollars to zero. Nor can one argue that Mr. Lucas's investment-backed expectations were anything other than to be able to build houses like those beside his lots. Respondent is, therefore, arguing for a categorical denial of just compensation because the act is for the health, welfare, and safety of the public.

The notion of public necessity contains a key element absent in the concept of public nuisance. This is the sense of urgency. A necessity is a circumstance which is instant and overwhelming, often leaving no choice of means and little moment for deliberation. As one court has noted, "[p]ublic necessity . . . is that urgent, immediate public need arising from existing conditions, which . . . justifies a disturbance of private rights that otherwise might be legally exempted from such interference." *In re Shelton St. R. Co.*, 69 Conn. 626, 629, 38 A. 362, 363 (1897).[10] When a regulation is designed to handle a temporary and urgent situation, necessity gives the State the freedom to act on behalf of its citizens. The basis of this contention is found in the "common law [which] has long recognized that in times of imminent peril . . . the sovereign could, with immunity, destroy the property of a few that the property of many and the lives of many more could be saved." *United States v. Caltex*, 344 U.S. 149, 154 (1952). Once the peril has passed, of course, the necessity for confiscatory action likewise disappears.

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[9] Certain uses of land – particularly the construction and occupation of a dwelling – are presumptively deemed under the common law *not* to be nuisances. Building a private residence on one's own land is a fundamental right of property ownership, which "cannot remotely be described as a 'governmental benefit'." *Nollan v. California Coastal Comm'n*, 483 U.S. 825 n.2 (1987).

[10] The pre-*Mugler* cases are a restatement of the public necessity notion. *See, e.g., Commonwealth v. Tewksbury*, 52 Mass. (11 Met.) 55, 57-58 (1846) (compensation would only be denied in cases where the regulation responds to an activity which is "injurious to the public," and only in cases "[a]mounting to an obvious public exigency.").

From the earliest times, *see, e.g., King's Prerogative in Saltpetre*, 12 Co. Rep. 12, 77 Eng. Rep. 1294 (K.B. 1607) (allowing Crown to enter land and dig for saltpetre "for the defence of the realm"); *Mouse's Case*, 12 Co. Rep. 63, 77 Eng. Rep. 1341 (K.B. 1607) (jettisoning chattels from sinking boat), the doctrine of public necessity has been justified by extraordinary urgency. The jurisprudence of this Court has been consistent in recognizing public necessity only in the most grave of situations.[11] These are, in fact, the *only* cases decided by this Court in which a complete taking of an owner's property interest in land has been permitted without just compensation.

The imminence of danger conveyed by the public necessity doctrine would be decisive in limiting the scope of a so-called "nuisance exception" in which a government could regulate hazardous land-use activities without triggering the Takings Guarantee of the Fifth Amendment. Land-use regulations could still be adopted by legislative action. But the threshold justification for uncompensated takings would be raised. Unless a showing of imminent danger is made, the government must still compensate landowners for regulations which effect

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[11] *See Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 134-35 (1851) (destruction of property by military officer constituted a public necessity, but was still compensable); *Bowditch v. Boston*, 101 U.S. 16 (1880) (house destroyed to stop an advancing fire); *Peabody v. United States*, 231 U.S. 530, 538-40 (1913) (artillery testing necessary for national security); *Portsmouth Harbor Land & Hotel Co. v. United States*, 250 U.S. 1, 2 (1919) (same); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 165-69 (1958) (War Board closure of gold mines in order to preserve manpower during World War Two).

a taking of a property interest in land. And, as noted above, even if there is an imminent peril, once it has dissipated the government must either discontinue the confiscatory regulation or render compensation for it.

Petitioner believes that this standard of public necessity would successfully distinguish cases in which the government is seeking an exception to the Takings Guarantee. As an additional safeguard, it is submitted that the primary purpose of the regulation must also be examined. This would ensure that public necessity is not being used as a pretext in order for the government to promote some public benefit in the private property being regulated. *See* Pet. Br. 38-41. Petitioner does not suggest that this prong, standing alone, would well-serve courts in cases such as this. Although some state supreme courts have upheld a takings claim on the finding that the regulation was primarily intended to promote a public benefit in the affected land, *see, e.g., Annicelli v. Town of South Kingston*, 463 A.2d 133, 140 (R.I. 1983) ("[t]he overall purpose of the ordinance in question is to benefit the public welfare by protecting vital natural resources, here barrier beaches, and preserving them for posterity"), Petitioner agrees that it is sometimes difficult for courts to divine the primary intention of a land-use regulation. Nevertheless, this element of the analysis should still be recognized by this Court as significant.

No exception to the Just Compensation Clause should be made when there is a total take. If an exception is to be established it must be narrowly drawn. Petitioner believes that the two-pronged test, propounded above and in his Brief on the Merits, comes closest to remaining

true to the Constitutional text and its fundamental wisdom that the protection of individual property rights is "the first object of government." *The Federalist* No. 10, at 78 (James Madison) (Clinton Rossiter ed. 1961).

CONCLUSION

The judgment of the Supreme Court of South Carolina should be REVERSED.

Respectfully submitted,

A. CAMDEN LEWIS
Counsel of Record
LEWIS, BABCOCK & HAWKINS
1513 Hampton Street
P.O. Box 11208
Columbia, South Carolina 29211
(803) 771-8000

GERALD M. FINKEL
Attorney for Petitioner
FINKEL, GOLDBERG, SHEFTMAN & ALTMAN
P.O. Box 1799
Columbia, South Carolina 29202

DAVID J. BEDERMAN
Of Counsel
EMORY UNIVERSITY SCHOOL OF LAW
Gambrell Hall
Atlanta, Georgia 30322

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OCTOBER TERM, 1991

DAVID H. LUCAS, PETITIONER

v.

SOUTH CAROLINA COASTAL COUNCIL

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF REVERSAL

KENNETH W. STARR
Solicitor General

BARRY M. HARTMAN
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

ROGER CLEGG
Deputy Assistant Attorney General

BENEDICT S. COHEN
Acting Deputy Assistant Attorney General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

PETER R. STEENLAND
JAMES E. BROOKSHIRE
JOHN A. BRYSON
MARTIN W. MATZEN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

This case involves the application to petitioner's beachfront lots of South Carolina's 1988 Beachfront Management Act. When this case arose, that Act prohibited the building of any habitable structure seaward of a setback line established by the South Carolina Coastal Council. The questions presented are:

1. Whether petitioner has a ripe claim that application of the Beachfront Management Act resulted in a taking of his property, in light of 1990 amendments to the Act that provide for issuance of special permits to build structures seaward of the setback line in certain circumstances.

2. Whether application of the Act to petitioner's lots results in a taking of property for which payment of compensation is required by the Fifth Amendment.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF REVERSAL

INTEREST OF THE UNITED STATES

This case involves a claim that application of building restrictions under South Carolina's 1988 Beachfront Management Act to particular beachfront lots resulted in a taking of property within the meaning of the Fifth Amendment. The 1988 Act was approved by the Secretary of Commerce, through the National Oceanographic and Atmospheric Administration, as consistent with the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. 1451 *et seq.* 54 Fed. Reg. 7580 (1989). The CZMA establishes a national policy of protecting the resources of the Nation's coastal zone and encouraging States to adopt coastal management programs that, *inter alia*, seek to minimize the loss of life and property caused by improper

development in flood-prone, storm surge, and erosion-prone areas and destruction of natural protective features such as beaches and dunes. 16 U.S.C. 1452(2), 1456b(a)(2). In addition, the National Flood Insurance Act of 1968, 42 U.S.C. 4001 *et seq.*, administered by the Federal Emergency Management Agency, conditions availability of federal flood insurance in communities on adoption of adequate flood-plain and land-use measures that are consistent with federal standards to reduce future losses. See 42 U.S.C. 4002(b)(3), 4022; *Adolph* v. *FEMA*, 854 F.2d 732 (5th Cir. 1988). Federal agencies also engage in direct regulation that affects real property (see, *e.g.*, Clean Water Act, 33 U.S.C. 1344; *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126-127 (1985) (wetlands)) and personal property (*e.g.*, food, drugs, and pesticides). At the same time, the United States has an obligation to ensure that such programs are implemented in a manner that respects basic constitutional protections. See Exec. Order No. 12,630, 3 C.F.R. 555 (1989) (directing the Attorney General to assist federal agencies to minimize the extent to which their regulatory activities result in a taking of property rights).

STATEMENT

1. In December 1986, petitioner purchased two beachfront lots in the Wild Dunes development on the Isle of Palms in South Carolina. T.R. 27.[1] He intended to build a single-family residence on each lot, one for his family and the other for investment. A house had been constructed on the lot situated between petitioner's two lots in the early 1980s; there

[1] "T.R." refers to the Transcript of Record that was filed in the South Carolina Supreme Court.

were also houses on other nearby beachfront lots. Pet. App. 36.

At the time, activities along the South Carolina coast were regulated by the State's Coastal Zone Management Act of 1977, S.C. Code Ann. §§ 48-39-10 *et seq.* The 1977 Act established coastal "critical areas," which included the beaches and primary ocean-front sand dunes. § 48-39-10(H), (I) and (J). The Act directed the South Carolina Coastal Council to develop an erosion-control policy, § 48-39-120, and authorized the Council, under general standards, to issue permits for development within critical areas. § 48-39-130. The line delineating the "critical area" along the Isle of Palms was seaward of petitioner's lots. As a result, those lots were not subject to restrictions under the 1977 Act when petitioner purchased them in 1986. Pet. App. 33-34, 36.

2. South Carolina's regulatory regime changed significantly with the enactment of the Beachfront Management Act, which became effective on July 1, 1988. The 1988 Act increased protection for the beach/dune system by extending the "critical area" to the entire zone between the mean high-water mark and a setback line fixed by the Council "utiliz[ing] the best available scientific and historical data." S.C. Code Ann. § 48-39-280(A) (Supp. 1990); see also § 48-39-10(J)(4) (Supp. 1990). Under the statute, the Council first must establish a "baseline." In an erosion zone such as that in which petitioner's lots are located—*i.e.*, an inlet zone that has not been stabilized by jetties or other structures—the baseline must be at the most landward point of erosion during the past 40 years, unless available data "indicate that the shoreline is unlikely to return to its former position." § 48-39-280(A)(2) (Supp. 1990). The Council then must establish a setback line landward of the base-

line by a distance 40 times the annual erosion rate, but not less than 20 feet. § 48-39-280(B) (Supp. 1990). The 1988 Act prohibited construction of habitable structures seaward of the baseline (and reconstruction of any preexisting structures that may be damaged beyond repair by natural causes or fire). §§ 48-39-300, 48-39-290(B)(8) (1988 S.C. Acts 5144, 5140); J.A. 3. As relevant here, the baseline falls on the road landward of petitioner's lots. See DX 22 (J.A. 9 (Map)); T.R. 71.

3. After passage of the 1988 Act, petitioner filed this inverse condemnation action seeking compensation for an alleged taking that resulted from application of the new statute to his lots. Although petitioner did not apply for a permit from the Council (or the town) to construct a house on either lot (T.R. 39-40, 98), the parties stipulated that a permit would have been denied under the 1988 Act had one been sought. The Council nonetheless "reserve[d] as an argument concerning temporary damages that no permit has been applied for by [petitioner]." J.A. 3-4.

The trial court found that at the time of purchase, there were no restrictions imposed by the State, county, or town on use of the lots for single-family residences and that the 1988 Act prevented that use. Pet. App. 36. The court determined that the Act "deprive[d] Lucas of any reasonable economic use of the lots" and rendered them "valueless," and found a taking on that basis. *Id.* at 37, 38, 40. The court awarded petitioner $1,170,000 in compensation, representing the fair market value of the lots on the date the 1988 Act became effective. *Id.* at 40.

4. A sharply divided South Carolina Supreme Court reversed, holding that no taking resulted from the 1988 Act's effect on petitioner's lots. Pet. App. 1-32.

It observed that although regulatory-taking questions are often complex, the appeal here presented a "relatively straightforward issue": whether petitioner was correct in arguing that "if he is deprived of 'all economically viable use' of his property, he must be compensated for it even if the regulation depriving him of such is a use-restriction regulation enacted to prevent serious public harm." *Id.* at 2-3. The court took petitioner to have conceded the validity of the Legislature's findings and that the Act "is properly and validly designed to preserve the extremely valuable resource which is South Carolina's beaches." *Id.* at 4. As a result, it reasoned, petitioner also conceded that construction "contributes to the erosion and destruction of this public resource" and that "discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm." *Id.* at 8. The court also noted that petitioner did not "contend that the setback requirements affecting him are unreasonable or disproportionate to the goal of preventing the specified harms." *Id.* at 15.

Against this background, the court rejected petitioner's contention that he is entitled to compensation, "regardless of any other consideration." Pet. App. 9; see *id.* at 9-17. It stated that "a taking has not been found when the regulation exists to prevent serious public harm," *id.* at 10, and explained this result on " 'the simple theory that since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not "taken" anything when it asserts its power to enjoin the nuisance-like activity.' " *Ibid.* (quoting *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 491 n.20 (1987)). Here, the court concluded, petitioner's failure to attack the legislative findings "that

new construction would cause serious public harm * * * amounts to a concession that the *Mugler* 'nuisance-type exception' applies." Pet. App. 12 (referring to *Mugler* v. *Kansas*, 123 U.S. 623 (1887)).

The two dissenting Justices acknowledged the *Mugler* decision and agreed that it precluded the finding of a taking if the statute is necessary for the public's health, safety, and welfare, "regardless of the extent of loss suffered by the property owner." Pet. App. 20; see *id.* at 20-23. However, the dissenters believed that the 1988 Act is "not subject to the *Mugler* analysis" because it does not have as its primary purpose the prevention of a nuisance or comparable harms, but instead confers a benefit on the State by creating a habitat for flora and fauna and a place of natural beauty, and by "providing a barrier and buffer from high tides, storm surge, hurricanes and normal erosion." *Id.* at 27. The dissenting Justices would have found a taking on the basis of the trial court's finding that the lots lack fair market value and economically viable use. *Id.* at 29-31. They then would have remanded to the Council to allow petitioner to apply for relief under the "special permit" provisions added by the 1990 amendments to the 1988 Act (see pages 8-10, *infra*) and for an award of compensation if the Council did not grant him one. Pet. App. 31 (citing § 48-39-290(D)) (Supp. 1990).

SUMMARY OF ARGUMENT

1. There is no present basis for finding a permanent taking, in view of petitioner's ability to apply for a special permit under the 1990 amendments. Even if petitioner is granted a special permit, however, he may still have a temporary taking claim for the period prior to the institution of the special permit procedure. This Court need not reach that claim in the first instance, but may instead vacate the judg-

ment below and remand to allow the state courts to consider the viability and validity of any such claim.

2. Government has the established right to prevent certain noxious uses of property that cause serious harm to others without compensating the owner of the offending property, even if the property has substantially diminished economic value in the absence of the prohibited use. Some situations involving total destruction of property or substantial reduction of its value (*e.g.*, destruction of diseased food, condemnation of an unsafe building, or a prohibition against building on an unsafe site) do not require compensation. More generally, regulatory measures that substantially further the public interest in preventing established nuisance-type activities or serious harm to the public health or safety may not require compensation. That "nuisance exception" was well established at the time of the framing and ratification of the Bill of Rights, and is firmly rooted in *Mugler* v. *Kansas*, 123 U.S. 623 (1887), and numerous other decisions, as well as principles of property rights on which those decisions rest.

The scope of this category of measures designed to prevent an established nuisance or protect the public health and safety, however, is by no means coterminous with the full range of a State's police powers. It is instead limited by the principles from which it springs: such measures must in fact respond to serious harms to public health and safety that are substantial in nature, degree, proximity, and context. The South Carolina Supreme Court did not adequately consider whether the restrictions imposed on petitioner's lots meet this standard. That inquiry is particularly important here, where petitioner's two lots are in a highly developed area, the State's own recent amendments contemplate building in some circum-

stances, and petitioner seeks to engage in a normally unobjectionable use—building single-family residences next to other single-family residences. These factors combine to cast considerable doubt on whether the regulatory regime erected by South Carolina in 1988 is properly viewed as directed at a nuisance or threat to safety. A legislature's routine exercise of the police power may not be brought within the "nuisance exception" to normal application of takings analysis simply by incantation of the words "health and safety"; such an approach would render the Just Compensation Clause a hollow guarantee.

3. If a statute does not fall within the narrow category of laws designed to abate a nuisance or similar public health and safety threat, whether it amounts to a taking requires a careful assessment of the three factors the Court has identified in its regulatory-takings decisions: the regulation's economic impact, the character of the governmental action, and the extent to which it interferes with reasonable, investment-backed expectations.

ARGUMENT

I. THIS CASE SHOULD BE CONSIDERED IN LIGHT OF THE SPECIAL PERMIT PROVISIONS ENACTED BY THE 1990 AMENDMENTS TO THE 1988 BEACHFRONT MANAGEMENT ACT

There no longer is any live claim of a permanent taking in this case. The trial court found that the 1988 Beachfront Management Act resulted in a permanent taking of petitioner's lots because it entirely prevented him from building houses on them, rendering them valueless. Pet. App. 37, 40. As the dissenting Justices in the South Carolina Supreme Court pointed out (*id.* at 31), however, the 1990 amendments to that Act now authorize the Coastal Council

to issue a "special permit" to build or rebuild a structure (other than an erosion-control device) seaward of the baseline, if (1) the structure would not be on the active beach or a primary oceanfront dune, (2) the permittee agrees to remove the structure should erosion occur to the extent that the structure becomes situated on the active beach (see § 48-39-270(13) (Supp. 1990)), and (3) the use would not be detrimental to the public health, safety, or welfare. § 48-39-290(D) (Supp. 1990). Petitioner has not sought a special permit under this provision. See Br. in Opp. 5.

This Court has repeatedly admonished that a property owner has no ripe and justiciable claim for a regulatory taking until he has secured at least a final administrative determination of whether and how the regulatory statute will be applied to the property at issue. *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126-127 (1985). This rule is "compelled by the very nature of the inquiry required by the Just Compensation Clause," because the factors applied in deciding a taking claim "simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 190, 191 (1985). See *MacDonald, Sommer & Frates* v. *County of Yolo*, 477 U.S. 340, 348 (1986) ("A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes."). This requirement defines the point at which a taking claim accrues; identifies precisely what the landowner wants to do with his property and why he believes that the use would not be harmful; establishes the extent to which the agency has

applied the regulatory measure to defeat the proposed use; and enables the agency to furnish particularized reasons to support its action. The issue of whether a permanent taking has occurred simply cannot be addressed until the applicability of the 1990 amendment procedure to petitioner's lots is clarified.

There remains, of course, the question whether a *temporary* taking occurred between passage of the 1988 Act and the 1990 amendments. This quite distinct issue of a temporary taking was not addressed by either court below. In fact, although the Council stipulated at trial (in connection with the permanent taking claim) that an application for a permit to build a home would have been denied under the 1988 Act, it expressly "reserve[d] as an argument concerning temporary damages that no permit has been applied for by [petitioner]." J.A. 3-4.

Thus, the Council apparently has preserved the position that no temporary taking can be found under its regulatory scheme unless the owner has applied for and been denied a permit. See also § 48-39-180. This ripeness argument, and other aspects of any temporary taking claim (including whether petitioner was deprived of any existing or planned use of the property during the relevant period), should be resolved by the state courts in the first instance. Although the South Carolina Supreme Court declined to remand in light of the 1990 amendments (Pet. Reply Br. 3; see Pet. App. 17 n.8), this Court might choose to vacate the judgment below and remand for further consideration in light of those amendments—especially in view of possible threshold impediments to a temporary taking claim, the narrow focus of petitioner's argument to date, and the failure by the courts below fully to consider the relevant aspects of the taking issue.

II. A LIMITED CATEGORY OF REGULATORY MEASURES DESIGNED TO PREVENT NUISANCES OR OTHER SERIOUS HARMS TO PUBLIC HEALTH OR SAFETY DO NOT CONSTITUTE A TAKING EVEN IF THE VALUE OF AFFECTED PROPERTY IS SUBSTANTIALLY DIMINISHED

The Just Compensation Clause of the Fifth Amendment affords vital protection to individual liberty by protecting private property rights against invasion by the government. At the same time, the government has the right to abate nuisances and prevent harm to public health and safety without incurring an obligation to compensate those whose uses are affected, and ownership of private property has never been understood to include the right to engage in noxious uses harmful to public health and safety. The tension between these principles is especially acute where, as the trial court found here under the 1988 Act, a governmental action has a dramatic economic impact on a particular parcel of property. Accordingly, the category of situations that fall within the government's authority to abate nuisance-type activities must be carefully circumscribed so as not to eviscerate the protections of the Just Compensation Clause.

The proper accommodation lies, we submit, in the roots of the *Mugler* principle itself, which recognizes the established need of the government to respond to certain noxious uses of property that affect the persons and property of others, as well as similar actions that threaten identified harm to public health and safety. To justify a finding of no taking on the *Mugler* principle alone, the regulatory measure must substantially further an established nuisance-prevention or public health and safety purpose, in terms of the nature, degree, proximity, and context of the

harm concerned. Such measures plainly do not extend to embrace the full range of a State's police powers, and when government engages in legitimate regulation that is not properly characterized as prevention of such established nuisance-type harms, it may not rely on the *Mugler* principle to immunize itself from compensation demands.

1. It is clear as an initial matter that there exists some category of governmental authority that may result in the substantial diminution of property values, and yet not require payment of compensation as a condition to its lawful exercise. For example, the government may seize and destroy unwholesome foods and unsafe drugs, and may destroy goods to prevent the spread of disease.[2] Similarly, under the Controlled Substances Act, 21 U.S.C. 801 *et seq.*, it may be lawful to manufacture, possess and sell a certain drug one day and a felony to do so the next (see, *e.g.*, *Touby* v. *United States*, 111 S. Ct. 1752 (1991)), with the result that existing stocks are rendered valueless. The government's ability to protect the public through such measures is historically well established and thus has not been conditioned upon payment of compensation to those who would inflict the harm.[3]

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[2] See, *e.g.*, Federal Food, Drug and Cosmetic Act, 21 U.S.C. 301 *et seq.*; Federal Meat Inspection Act, 21 U.S.C. 601 *et seq.*; Poultry Products Inspection Act, 21 U.S.C. 451 *et seq.*; 21 U.S.C. 350a (prohibiting sale of adulterated infant formula); see also Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136 *et seq.*

[3] See 4 W. Blackstone, *Commentaries* 162 (1769) (statutes prohibiting sale of unwholesome food); *Russell* v. *Mayor, etc., of New York*, 2 Denio 461, 476 (1845) (New York statute passed during cholera epidemic authorizing destruction of

The same principle also applies to real property. Thus, the government may condemn a residence or other building that is unsafe for habitation, even though the value of the building (in itself a distinct species of property) will be entirely destroyed, or may bar construction in an unsafe manner (*e.g.*, by requiring compliance with a building code), even where compliance would render it economically unviable to proceed. Restrictions against siting a residence or other building on a steep slope or other unsafe location stand on an equal footing. In other circumstances, affirmative obligations imposed on the owner to protect public health and safety may also have a substantial effect on the value of the property. See *Midlantic Nat'l Bank* v. *New Jersey Dep't of Environmental Protection*, 474 U.S. 494, 502, 509 & n.2 (1986). Another familiar example, deeply rooted in history, is the right of the government (without compensating the owner) to tear down a struc-

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"an unlimited amount of the property of its citizens, for the purpose of preventing the spread of the disease, without imposing any obligation or subjecting [the agents] to any responsibility whatever"); *Gilman* v. *Philadelphia*, 70 U.S. (3 Wall.) 713, 730-731 (1865) ("a bale of goods, * * * laden with infection, may be seized under 'health laws,' and if it cannot be purged of its poison, may be committed to the flames"); *Sligh* v. *Kirkwood*, 237 U.S. 52, 59-60 (1915) (such items are not "legitimate subjects of trade or commerce" and "may be rightly outlawed as intrinsically and directly the immediate sources and causes of destruction to human health and life"); *Empire Kosher Poultry, Inc.* v. *Hallowell*, 816 F.2d 907 (3d Cir. 1987) (no taking in context of poultry quarantine); but cf. *Yancey* v. *United States*, 915 F.2d 1534 (Fed. Cir. 1990); but see *McDougal* v. *County of Imperial*, 942 F.2d 668, 675-680 (9th Cir. 1991) (remanding for inquiry into substantiality of public interest underlying floodway ordinance, as well as private interest affected).

ture in order to create a firebreak. See *Respublica* v. *Sparhawk*, 1 U.S. (1 Dall.) 357, 362 (Pa. 1788) ("Houses may be razed, to prevent the spreading of fire, because for the public good."); *Stone* v. *Mayor & Aldermen*, 25 Wend. 157, 161 (N.Y. 1840) (quoting 2 *Kent's Commentaries* 339); *id.* at 173-174;[4] *Bowditch* v. *Boston*, 101 U.S. 16, 18-19 (1879);[5] *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415-416 (1922); see also *United States* v. *Caltex, Inc.*, 344 U.S. 149, 154 (1952).

2. The roots of the foregoing principles extend deep into the Court's precedents and historical definitions of private property rights, and into the correlative power of the government to abate nuisances and protect public health and safety from serious harm.[6] This backdrop is important because historical

[4] See also 25 Wend. at 176 (citing *Mouse's Case*, 12 Coke Rep. 62 (merchandise thrown overboard to save passengers)).

[5] "At the common law every one had the right to destroy real and personal property, in cases of actual necessity, to prevent the spreading of a fire, and there was no responsibility on the part of such destroyer, and no remedy for the owner. * * * There are many other cases besides that of fire,—some of them involving the destruction of life itself,—where the same rule is applied. * * * In these cases the common law adopts the principle of the natural law, and finds the right and the justification in the same imperative necessity." 101 U.S. at 18-19.

[6] See *The License Cases*, 46 U.S. (5 How.) 504, 589 (1847) (opinion of McLean, J.):

> The acknowledged police power of a State extends often to the destruction of property. A nuisance may be abated. * * * It is a power essential to self-preservation, and exists, necessarily, in every organized community.

understandings give content to the Bill of Rights, including the Fifth Amendment (see, *e.g.*, *Griffin* v. *United States*, No. 90-6352 (Dec. 3, 1991), slip op. 3-5), and because those understandings must be taken into account in assessing what the Framers understood the private property they were protecting from uncompensated takings to include. If the use of property in a particular way was not part of the owner's "bundle" at the time he acquired the property, he cannot claim the government has "taken" from him the right to that use.

The necessary interrelationship between property rights and the correlative power of the government to protect the person and property of others (and the public interest) first received extensive treatment by this Court in *Mugler* v. *Kansas*, 123 U.S. 623 (1887).[7] But the principles applied in *Mugler* did not originate in that case; they find their roots in the law of nuisance in England[8] and were already widely accepted in the law of the States pertaining to property rights

[7] See also 123 U.S. at 666-667, discussing *Fertilizing Co.* v. *Hyde Park*, 97 U.S. 659, 667 (1878), which sustained an ordinance prohibiting the manufacture of fertilizer, even though it "operated to destroy the business of the company, and seriously to impair the value of its property," because it had become a nuisance. 123 U.S. at 667. The Court continued: " 'That power belonged to the States when the Federal Constitution was adopted. They did not surrender it, and they all have it now. * * * It rests upon the fundamental principle that every one shall so use his own as not to wrong and injure another. To regulate and abate nuisances is one of its ordinary functions.' " *Ibid.* (quoting 97 U.S. at 667).

[8] 3 W. Blackstone, *Commentaries* 216-218 (1768); 4 *id.* at 168; Restatement (Second) of Torts § 821B, comment a; *id.* § 821D, comment a (1979).

and constitutional protections.[9] For example, in *Stuyvesant* v. *Mayor &c. of New York*, 7 Cow. 588 (1827), the New York Supreme Court sustained an ordinance that barred interment in certain parts of the City. Accord, *Laurel Hill Cemetery* v. *San Francisco*, 216 U.S. 358, 366 (1910); *Appeal of Kincaid*, 66 Pa. 411, 423-424 (1870). In addition, the Court in *Mugler* relied (123 U.S. at 665) on the frequently cited decision of the Supreme Judicial Court of Massachusetts in *Commonwealth* v. *Alger*, 61 Mass. 53 (1851), which involved an ordinance barring construction of wharves beyond a harbor line and declaring such wharves to be a nuisance. Similarly, and instructive here, *Commonwealth* v. *Tewksbury*, 52 Mass. 55 (1846), sustained, as applied to the owner of beach property, an ordinance barring removal of sand or gravel from a beach. Because property "is held under the implied obligation that the owner's use of it shall not be injurious to the community" (*Mugler*, 123 U.S. at 665),[10] the power of the government to adopt such measures continues to exist—and continues to define and limit the underlying property right—even if it remains unexercised. So long as the government regulation does not depart from the common law origins of nuisance, there is no taking.[11]

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[9] See, *e.g.*, *People* v. *Hawley*, 3 Mich. 330, 342 (1854); *Pumpelly* v. *Greenbay Co.*, 80 U.S. (13 Wall.) 166, 177-178 (1872).

[10] See also *Stuyvesant* v. *Mayor &c. of New York*, 7 Cow. at 605; *Commonwealth* v. *Alger*, 61 Mass. at 84-85.

[11] Nor have this Court's post-*Mugler* decisions suggested any departure from *Mugler*'s fundamental principles. See *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915) (no taking where law forbade operating brickyard in residential area); *Reinman* v. *City of Little Rock*, 237 U.S. 171 (1915) (no taking where law forbade operating livery stable in downtown area); *Miller* v. *Schoene*, 276 U.S. 272 (1928) (state required destruction of cedar trees to protect apple trees from cedar rust disease, where apples were an economically important crop); *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962) (no taking where law forbade excavation of sand and gravel below water line to protect public water supply); see also *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 488-492 (1987).

III. THE CATEGORY OF MEASURES THAT DO NOT CONSTITUTE A TAKING SOLELY BECAUSE THEY ARE DESIGNED TO PREVENT NUISANCES AND OTHER HARMFUL USES OF PROPERTY MUST BE LIMITED BY REFERENCE TO THE NATURE, DEGREE, PROXIMITY AND CONTEXT OF THE HARM

For the reasons stated in Point II, we agree with the view—endorsed by all Justices of the South Carolina Supreme Court— that there is a category, properly defined, of regulatory measures designed to prevent nuisances or harm to public health and safety that do not constitute a taking, even if, in certain circumstances, they substantially diminish the value of the affected property. But it is precisely because of this potential impact that the category of cases falling under the *Mugler* principle must be carefully circumscribed according to the underlying exigencies that justify it. That is especially so as regards real property, which typically is not subject to the sort of pervasive regulation—or the potential for such regulation—that often attends ordinary commerce in goods and services. It is on the application of these principles here that we disagree with the South Carolina Supreme Court.

1. In the first place, as this Court has made clear, the category of regulatory measures whose applica-

tion may be justified (without payment of compensation) solely on the *Mugler* rationale " 'is not coterminous with the police power itself.' " *Keystone*, 480 U.S. at 491 n.20 (quoting *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 145 (1978) (Rehnquist, J., dissenting)); see also 480 U.S. at 512 (Rehnquist, C.J., dissenting). The general rule is that the takings implications of a regulatory measure must be analyzed under the Court's three-factor test, under which the purpose of the regulation is not dispositive. See pages 25-26, *infra*. Otherwise, the police power would swallow the Just Compensation Clause.

The *Mugler* principle, rather, is confined to measures that are designed to protect public health and safety from serious harm or to prevent or abate a nuisance-type activity. It is essential, moreover, that the type of nuisance measures falling within this category be defined in an objective and non-manipulable manner, for otherwise a legislature could circumvent the Just Compensation Clause in the regulatory context simply by designating as a nuisance whatever use of property it wished to restrict. Thus, although the Court has noted that legislatures are not strictly limited by common-law categories in determining what constitutes a nuisance for these purposes, *Miller* v. *Schoene*, 276 U.S. at 280, the common law *origins* of the rule should inform a court's review of a statute to determine whether it falls under the *Mugler* principle. Accordingly, before concluding that *Mugler* applies, a reviewing court must determine that the statute is rooted in the principle that individuals may not make a "noxious use of their property, to inflict injury upon the community." *Mugler*, 123 U.S. at 669. A landowner could not reasonably have expected to put his property to such a use. By contrast,

regulatory measures (such as a typical zoning ordinance) that restrict one person's use of his property in order to confer a *benefit* on adjacent property owners or the public at large do not constitute the abatement or prevention of a nuisance for purposes of the *Mugler* principle. Compare 3 W. Blackstone, *supra*, at 217 ("But depriving one of a mere matter of pleasure, as of a fine prospect, by building a wall, or the like; this, as it abridges nothing really convenient or necessary, is no injury to the sufferer, and is therefore not an actionable nuisance."). Such regulatory efforts must be analyzed under the usual three-factor test to determine whether the government must compensate affected landowners.

The court below purported to recognize this point, stressing that it was not holding that the mere fact that the State acted pursuant to its police power ended the inquiry, but rather that no taking occurs when a State "acts to prevent a serious public *harm*." Pet. App. 11. The difficulty is that the legislative findings and policies in the 1988 Act on which the court exclusively relied in rejecting petitioner's taking claim demonstrate that the Act furthers a number of ultimate purposes, only some of which might fall within the nuisance or safety rationale. Compare *Keystone*, 480 U.S. at 512-513 (Rehnquist, C.J., dissenting). The Act recites, for example, that the beach/dune system it seeks to protect provides a basis for the State's tourism industry (which contributes substantially to the State's economy and tax base) and a natural environment for the well-being of its citizens, and that it is in the public interest to promote increased public access to the State's beaches. S.C. Code Ann. § 48-39-250(1)(b) and (d), (8) (Supp. 1990); see also § 48-39-260(1)(b) and (c),

(6) (Supp. 1990). Achievement of these goals may benefit the people and economy of the State, but they plainly do not, in themselves, bring this case under the *Mugler* doctrine. The nuisance exception to the usual regulatory-taking analysis is premised on the prevention of harmful or dangerous uses of property—in the nature of nuisance—and not on the conferral of benefits on the public at large or owners of adjacent property. By contrast, other stated purposes of the Act—such as protection of life and property—are of the sort that, in proper circumstances, do fall within the *Mugler* doctrine. See §§ 48-39-250(1)(a) and (d), (3), 48-39-260(1)(a), (3), and (4) (Supp. 1990); see also 16 U.S.C. 1452(2) and 1456b(a)(2) (CZMA provisions stating comparable goals).

For these reasons, a more searching inquiry was required at the threshold to determine which of the purposes of the Act were actually implicated in application of the building restrictions to petitioner's lots, and whether those purposes are of a sort that fall within the *Mugler* category of nuisance-prevention or efforts to protect public health and safety from serious harm. In cases where a statute serves a variety of collateral purposes, there is the potential that it goes "beyond the necessities of the case," *Chicago, B. & Q. Ry.* v. *United States*, 200 U.S. 561, 593 (1906), and scrutiny of the fit between means and ends is necessary to ensure that the affected property owner is not being asked to bear "more than his just share of the burdens of government." *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 325 (1893).

2. Furthermore, a regulatory statute is not immune from a Fifth Amendment claim merely because it bears some plausible nexus to the prevention of

harm to individuals, property, or the public at large. If that were enough, the established principle that a house may be razed to prevent the spread of a fire (see pages 13-14, *supra*) could be extended to permit the razing of every other house in an existing row, to prevent the spread of a fire *if* one should occur. See *Keystone*, 480 U.S. at 513 (Rehnquist, C.J., dissenting) ("nearly every action the government takes is intended to secure for the public an extra measure of 'health, safety, and welfare' "). Thus, the foundation of the *Mugler* doctrine requires that, in order for the doctrine to apply, "a statute purporting to have been enacted to protect the public health, the public morals, or the public safety" must actually have a "real and substantial relation" to those objects. *Mugler*, 123 U.S. at 661; *Chicago, B. & Q. Ry.* v. *United States*, 200 U.S. at 593 ("real" and "substantial" relation); cf. *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 834-835 (1987) (condition must "substantially advance" the state interest). At least where its application to a particular parcel of real property precludes previously unrestricted uses, a determination of whether the requisite "real and substantial relation" exists requires an assessment of the degree of the harm to which the statute is addressed [12]—and, where the harm will occur (if at all) only in the future, its likelihood and proximity.

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[12] This principle is an established element of modern tort law as well. See Restatement (Second) of Torts § 821B (1979) (a public nuisance is an "unreasonable" interference with a right common to the general public, and a relevant circumstance in making that determination is whether the conduct involves a "significant interference" with, *inter alia*, public health or safety); *id.* § 821F (liability for a nuisance only to those to whom it causes "significant harm"); *id.* § 826 (invasion of another's use and enjoyment of land is unreason-

In this case, the 1988 Act prohibited new construction of any but temporary buildings seaward of a baseline fixed by the Coastal Council. In an erosion zone such as that in which the Wild Dunes development is located, the baseline was to be fixed at the landward-most point of erosion during the past 40 years, unless the available data indicated that the shoreline would be unlikely to return to its former position. See pages 3-4, *supra*. Application of this statutory formula placed the baseline on the road landward of petitioner's lots, and petitioner has not challenged that determination. T.R. 40. In addition, the Council introduced evidence at trial concerning the factual premises for the location of the baseline, recent episodes of erosion in the vicinity, and the possibility that erosion might occur to the extent that petitioner's premises would be situated on active beach. T.R. 65-88, 99-104. However, neither the trial court nor the South Carolina Supreme Court discussed the statutory requirements for drawing the baseline, the relationship of those requirements to purposes of the Act that might fall within the category of nuisance-prevention or public health and safety measures covered by the *Mugler* principle, the extent (if any) to which those purposes were addressed by the location of the baseline as it affected petitioner's lots, or the degree, likelihood, or prox-

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able if "the gravity of the harm outweighs the utility of the actor's conduct" or "the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible"); 1 F. Harper, F. James & O. Gray, *The Law of Torts* § 1.23, at 81 (1986) (a "requirement common to all private nuisance cases is that the interference must be *substantial*").

imity of the identifiable harms to which the Act is addressed.

3. In addition, an important element of the nuisance justification for application of the *Mugler* principle is the context in which the restriction applies, including the normal uses of property in the vicinity. This important element serves to protect the reasonable expectations of the property owner. As this Court said in *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 388 (1926):

> [T]he question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality.

See also *Commonwealth* v. *Alger*, 61 Mass. at 88; Restatement (Second) of Torts § 831 (1979).

It is as an initial matter strange to characterize the building of a single-family residence as a "nuisance." Here, houses have been built adjacent to petitioner's lots. It is stranger still to characterize as a "nuisance" the building of a house on a lot in a platted subdivision along a beach where other houses are already located.[13] In this respect, this case appears to be the mirror image of *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915), and *Reinman* v. *City of*

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[13] The owners of existing houses were affected by the 1988 Act to some extent, however, because it prohibited reconstruction of homes that might thereafter be destroyed by fire or natural causes. § 48-39-290(A) (Supp. 1990) (Pet. App. 116); see *Esposito* v. *South Carolina Coastal Comm'n*, 939 F.2d 165 (4th Cir. 1991).

Little Rock, 237 U.S. 171 (1915), where the use was prohibited because it was inconsistent with surrounding uses. Furthermore, where a statute uniquely prohibits a use of property that is permitted on adjacent parcels, the purposes of the Just Compensation Clause are directly implicated, because the owner is being asked to "surrender[] to the public something more and different from that which is exacted from other members of the public." *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 325 (1893). See also *Nollan*, 483 U.S. at 835-836 n.4; cf. *Commonwealth* v. *Alger*, 61 Mass. at 102 ("If such restraint were in fact imposed upon the estate of one proprietor only, out of several estates on the same line of shore, the objection would be much more formidable.").

4. Finally, in order for a taking claim to be rejected on the basis of the *Mugler* principle alone, a measure designed to abate or prevent a nuisance-type activity in the present context should, where feasible, be tailored to address the identified harm to the person or property of others (or to public health and safety), while minimizing the impact on the affected property. Cf. 1 F. Harper, F. James & O. Gray, *supra*, § 1.30, at 126-127; *Chenango Bridge Co.* v. *Page*, 83 N.Y. 178 (1880); *Babcock* v. *City of Buffalo*, 56 N.Y. 268, 272-273 (1874). Here, the 1990 amendments demonstrate that such tailoring was feasible, for they provide for issuance of a special permit to build a house seaward of the baseline, subject to the condition that the structure be removed if erosion occurs to the point that the structure becomes situated on active beach—at which point the attendant nuisance and safety concerns presumably would be most directly implicated. For this reason as well, the case should be remanded for further consideration

of petitioner's taking claim in light of the 1990 amendments.

5. If the South Carolina Supreme Court concludes on remand that application of the 1988 Act to petitioner's lots cannot be justified (without payment of compensation) on the basis of the *Mugler* doctrine alone, it should evaluate the case under the multifaceted analysis the Court has brought to bear on the question whether a taking has occurred in the regulatory context. In that setting, "no precise rule determines when property has been taken," and "the question necessarily requires a weighing of private and public interests." *Agins* v. *City of Tiburon*, 447 U.S. 255, 260-261 (1980); see also *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 593-594 (1962); *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. at 416 (taking issue is "a question of degree—and therefore cannot be disposed of by general propositions").

This approach reflects the wide range of governmental actions and resulting impacts upon private property interests in which the question may arise. Although the Court has been "unable to develop any 'set formula'" for this purpose, *Penn Central*, 438 U.S. at 124, it has identified three factors that are relevant to the inquiry: (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the government action." *Ibid.*; *Connolly* v. *PBGC*, 475 U.S. 211, 225 (1986); *Williamson County*, 473 U.S. at 191; *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979). Although the South Carolina Supreme Court adverted to these factors (Pet. App. 9), it did not fully consider them, since it disposed of the case in reliance on *Mugler*. The trial court focused on the economic impact of the 1988 Act

on petitioner, but did not address the purposes served by the Act or the extent and reasonableness of petitioner's investment-backed expectations concerning his lots. Pet. App. 39-40. These issues are properly left, as an initial matter, to the state courts on remand.

CONCLUSION

The judgment of the Supreme Court of South Carolina should be vacated and the case remanded for further proceedings.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

BARRY M. HARTMAN
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

ROGER CLEGG
Deputy Assistant Attorney General

BENEDICT S. COHEN
Acting Deputy Assistant Attorney General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

PETER R. STEENLAND
JAMES E. BROOKSHIRE
JOHN A. BRYSON
MARTIN W. MATZEN
Attorneys

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No. 91-453

IN THE

Supreme Court of the United States

October Term, 1991

DAVID H. LUCAS

Petitioner

vs.

SOUTH CAROLINA COASTAL COUNCIL

Respondent

MOTION FOR LEAVE TO FILE, AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER'S POSITION TO REVERSE THE OPINION AND ORDER OF THE SOUTH CAROLINA SUPREME COURT AND TO RESTORE DAMAGES AWARDED BY THE TRIAL COURT ON BEHALF OF THE LONG BEACH ISLAND OCEANFRONT HOMEOWNERS ASSOCIATION AND THE COASTAL ADVOCATE, INC.

THEODORE J. CARLSON
Counsel of Record
GOULD & WILKIE
One Wall Street
New York, New York 10005
(212) 344-5680

No. 91-453

IN THE

Supreme Court of the United States

October Term, 1991

DAVID H. LUCAS

Petitioner

vs.

SOUTH CAROLINA COASTAL COUNCIL

Respondent

MOTION OF THE LONG BEACH ISLAND OCEANFRONT HOMEOWNERS ASSOCIATION AND THE COASTAL ADVOCATE, INC. FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER'S POSITION TO REVERSE THE OPINION AND ORDER OF THE SOUTH CAROLINA SUPREME COURT AND TO RESTORE DAMAGES AWARDED BY THE TRIAL COURT

The Long Beach Island Oceanfront Homeowners Association and The Coastal Advocate, Inc. move this Court for leave to file a brief *amicus curiae* supporting the position of the petitioner to reverse the opinion and order of the South Carolina Supreme Court and to restore the damages awarded by the trial court.

INTERESTS OF *AMICI*

The Long Beach Island Oceanfront Homeowners Association is an association whose members own oceanfront properties on Long Beach Island, an island approximately 20 miles in length which forms

part of the New Jersey Atlantic Ocean shorefront. The Association has approximately 1,000 members and represents properties with market values estimated to be in excess of $75,000,000.

The Coastal Advocate, Inc. represents approximately 1,000 property owners and businesses on Long Beach Island with ownership of properties on the island having market values estimated to be in excess of $85,000,000.

The properties of the *amici* are threatened from time to time by proposed restrictions similar to those provided by the South Carolina statutes involved in this case which if they were to be adopted would place the *amici* in a *pari passu* position similar to those of property owners in South Carolina and thus they have interests vitally affected by a decision of the United States Supreme Court in this matter.

REASONS FOR GRANTING THE MOTION

The undersigned urges that the motion should be granted because it brings to the Court a discussion which may not be covered by other parties. In short, the issues in this case affect not only property owners where statewide regulation is in effect, but also properties where such legal restrictions may be imposed.

Consents of parties have been requested but none have been obtained at the time this motion was printed to meet the date set by the Court for filing.

Respectfully submitted,

THEODORE J. CARLSON
Counsel of Record
GOULD & WILKIE
One Wall Street
New York, New York 10005

December 26, 1991

No. 91-453

IN THE

Supreme Court of the United States

October Term, 1991

DAVID H. LUCAS

Petitioner

vs.

SOUTH CAROLINA COASTAL COUNCIL

Respondent

BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER'S POSITION TO REVERSE THE OPINION AND ORDER OF THE SOUTH CAROLINA SUPREME COURT AND TO RESTORE DAMAGES AWARDED BY THE TRIAL COURT ON BEHALF OF THE LONG BEACH ISLAND OCEANFRONT HOMEOWNERS ASSOCIATION AND THE COASTAL ADVOCATE, INC.

THEODORE J. CARLSON
Counsel of Record
GOULD & WILKIE
One Wall Street
New York, New York 10005
(212) 344-5680

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Respondent

BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER'S POSITION TO REVERSE THE OPINION AND ORDER OF THE SOUTH CAROLINA SUPREME COURT AND TO RESTORE DAMAGES AWARDED BY THE TRIAL COURT

This brief is presented on behalf of:

The Long Beach Island Oceanfront Homeowners Association whose members own oceanfront properties on Long Beach Island, an island approximately 20 miles in length which forms part of the New Jersey Atlantic Ocean shorefront. The Association has approximately 1,000 members and represents properties with market values estimated to be in excess of $75,000,000.

The Coastal Advocate, Inc. representing approximately 1,000 property owners and businesses on Long Beach Island with ownership of properties on the island having market values estimated to be in excess of $85,000,000.

The purpose of this brief is:

to support the position of appellant David Lucas;

to urge the reversal of the opinion and order of the Supreme Court of South Carolina; and in support thereof

to bring to the court's attention an issue which may not be covered by other briefs.

The issue referred to is the situation in which there are no state restrictions in existence which would circumscribe the right of private property owners but which restrictions have been threatened from time to time and may come into effect. This places New Jersey owners in a *pari passu* position with South Carolina owners and owners in all areas where state restrictions apply.

Long Beach Island consists of a number of boroughs and towns which have been long established on the island. The island has been subjected to extremely beneficial local zoning rules for an extended period of time. The island is subdivided into blocks and lots, and local streets which provide open access to the beach.

The island has a well developed dune system and all houses built on the island are *inshore* of the dunes. In fact, by regulation the dunes are protected from any human crossing and may not be used for any purpose other than the protection which they afford. On the ocean side of the dunes is a wide expanse of beach which is totally open to the public by unrestricted access by multitudinous streets and is freely used by large numbers of the general public. A number of jetties exist which have provided extensive protection from storms.

The island is not a recently developed area and has a long history with settlements on the island existing since Colonial times.[1]

The island is currently subject primarily to local regulation, but there have been continuous attempts to impose state control. The attempts have been in the form of proposed state legislation and two

1. In fact, for Beach Haven, a most interesting incident of the Revolutionary War is reported. Since people on the island have a full view of the ocean and shipping commerce, including coastal traffic from New York City to Philadelphia, local residents during the Revolutionary War acted as spies for General Washington to keep him posted on troop movements between New York City and Philadelphia. The British became aware of this practice and landed troops who killed a number of Beach Haven residents and the incident is cited as a dramatic indication of the long occupation and stable character of the island.

executive orders by successive governors of the state, both of which orders were declared to be unconstitutional and thus void. These attempts have provided for conditions which limit construction on oceanfront (on Long Beach Island, as referred to before, this means behind the dunes) and generally construction within defined distances from the ocean. The proposals have also included prohibitions against constructing houses which may have been 50% destroyed by natural causes.

The justification for the proposals has been for the alleged protection of the shoreline, but the allegations raise serious questions of fact and may be an expression of a generalized doctrine, philosophy, bias or point of view which may be extremely difficult to justify factually.

For example, many places on Long Beach Island are not experiencing erosion and in fact are enjoying accretion.

Furthermore, the plan of the island which provides for open public beaches, bordered by an extensive dune system, behind which are private houses on private property, calls into play the self-interests of private owners. This results in a very successful physical policing of the areas voluntarily by property owners and a pressure by the owners on municipal authorities to do a good job. The consequence is better maintenance, it is submitted, than is usually afforded to public property.

Thus, it is far from clear whether any of the threatened proposals would be in the public interest.

When the public interest is so uncertain, the justification for limiting the rights of property owners becomes very chimerical indeed.

But for the purposes of the Court's consideration, even if the public interest is served, the restrictions threatened to be imposed would clearly amount to deprivation of private property. If the public interest is to be served, it should not be subsidized by particular property owners and, in any event, regardless of theoretical justifications, the imposition of such regulations clearly violates the private

property protections of the Fifth Amendment and the Fourteenth Amendment to the United States Constitution.

Accordingly, this brief urgently requests the Court to reverse the decision of the Supreme Court of South Carolina and to find that the property owner in the *Lucas* case is entitled to compensatory damages.

Respectfully submitted,

THEODORE J. CARLSON
Counsel of Record
GOULD & WILKIE
One Wall Street
New York, New York 10005

December 26, 1991

No. 91-453

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In the
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DAVID H. LUCAS,
Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of South Carolina

BRIEF OF DEFENDERS OF PROPERTY RIGHTS, AMERICAN SHEEP INDUSTRIES ASSOCIATION, INC., ENVIRONMENTAL CONSERVATION ORGANIZATION, LAND IMPROVEMENT CONTRACTORS ASSOCIATION, & OUTDOOR ADVERTISING ASSOCIATION OF AMERICA, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Nancie G. Marzulla
President and Chief
Legal Counsel
6235 33rd Street, N.W.
Washington, D.C. 20015
(202) 686-4197

Counsel for Amici Curiae

December 31, 1991

DEFENDERS OF PROPERTY RIGHTS

QUESTIONS PRESENTED

1. Whether a statute which deprives a property owner of all of the economic value of his land goes too far and thus will be recognized as a taking?

2. Whether the Government must bear the burden of proving a nuisance defense of a taking claim?

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Pursuant to Rule 37.3 of the Rules of this Court, *Amici* in Support of Petitioner submit this brief *amici curiae*. The *amici* support reversal of the decision by the Supreme Court of the State of South Carolina.

INTEREST OF *AMICI CURIAE*

Defenders of Property Rights is a non-profit, public interest law foundation whose members are property owners, users and beneficiaries of the rights protected by traditional Anglo-American property law. Incorporated under the laws

of the District of Columbia, Defenders of Property Rights is designed specifically for the purpose of participating in legal action affecting the public interest and the private property rights of its membership. Defenders of Property Rights engages in litigation around the country on behalf of its membership in defense of property interests protected against government incursion by the Bill of Rights. Defenders of Property Rights has devoted a significant portion of its resources to the litigation of regulatory taking issues.

American Sheep Industries Association, Inc. is an organization of 109,000 sheep producers including 47 state associations and 20 affiliated organizations. The Association is dedicated to the protection of the rights of property use and ownership as essential elements in the sheep production industry.

The Environmental conservation Organization is a national organization of landowners and landowner associations working to balance environmental protection with economic vitality.

Land Improvement contractors Association is a 40-year old organization of building and construction contractors whose industry is dramatically impacted by zoning and land use regulations. The Association has been active at the national and local levels on behalf of its members in opposing unnecessary and excessively burdensome restrictions upon the use of private property.

The Outdoor Advertising Association of America, Inc. ("OAAA") is a national organization comprised of billboard and outdoor sign owners. Outdoor advertising is pervasively regulated through the zoning process and by other

mechanisms at the national, state and local levels. These regulations are often confiscatory. OAAA has been active for many years in the courts, Congress and in state legislatures in defense of the property rights of its members.

STATEMENT OF THE CASE

This case affords an opportunity to complete the unfinished business left open by the alternative tests set forth in *Agins v. City of Tiburon*, 447 U.S. 225 (1980),[1] where this Court stated:

> The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land.

Id. at 260. (Citations omitted).

While this Court made clear in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), that the first half of this alternative test is satisfied if the governmental action does not substantially advance the stated government purpose, lower courts require an equally clear articulation that a taking will also be recognized where the owner has been deprived of the economically viable use of his land.

Despite the court's repeated statement of the alternative test, lower courts have been reluctant to find a taking solely on the basis of deprivation of economic viability. As a

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[1] Since *Agins* did not involve a total deprivation of all economic value, the issue was not before the Court at that time.

result, courts have tended to indulge in a "belt and suspenders" approach to taking analyses even when the diminution in value has been complete, analyzing at length other factors which would seem to be extraneous under the plain language of the second half of the alternative test of *Agins*.[2]

The South Carolina Supreme Court clearly did not believe that this Court meant what it said in *Agins*, and thus refused to find a taking despite the deprivation of all economic value. This case squarely poses an instance in which a regulation deprives the property of all economic value requiring that this Court ascertain the vitality of the rule which it enunciated in *Agins*.

SUMMARY OF ARGUMENT

The Fifth Amendment to the United States Constitution, as applied to South Carolina through the Fourteenth Amendment, demands that Petitioners receive just compensation for the taking of their property under the South Carolina Coastal Council's beach management regulatory scheme. By statutorily mandating setback lines which prohibit the construction of any permanent structure such as a house or other habitable dwelling, South Carolina has deprived Petitioner of 100 percent of the economically

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[2] *See, e.g., Loveladies Harbor v. United States*, 21 Cl. Ct. 153 (1990), *appeal filed*, No. 91-5050 (Fed. Cir. argued Nov. 1991); *Florida Rock Industries, Inc. v. United States*, 8 Cl. Ct. 160, 179 (1985) *reversed on other grounds*, 791 F.2d 893 (Fed. Cir. U.S. 1054 (1987), *on remand*, 21 Cl. Ct. 161 (1990); and *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394 (1989), *modified*, 20 Cl. Ct. 324 (1990), *aff'd*, 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied*, U.S. (1991).

viable use of the property. A statute which results in the total deprivation of all the economic value of private property must be recognized as a taking in violation of the Fifth Amendment. Any holding short of that eviscerates the plain meaning of this constitutional guarantee.

Courts must look beyond broad legislative pronouncements determining whether a taking has occurred. To sustain a holding that a proposed use of property constitutes a nuisance (and therefore as a defense to a taking claim) there must be proof that actual public harm would be inflicted by that use. In this instance, the lower court relied only upon the legislative findings supporting the statute and, therefore, failed to ascertain whether Lucas' proposed use would indeed constitute a public nuisance.

I. A Statute Which Goes Too Far in Regulating Private Property Will be Recognized as a Taking

The United States Constitution limits the exercise of South Carolina's regulatory authority. The United States Constitution provides that private property shall not be "taken for public use, without just compensation." *U.S. CONST. amend. V.* The Taking Clause of the Constitution does not forbid the exercise of otherwise legitimate governmental authority. Instead, it places a condition upon the exercise of that authority, requiring that just compensation be paid when the governmental action amounts to a taking.

"This basic understanding of the [Fifth] Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but to secure *compensation* in the event of otherwise proper interference

amounting to a taking." *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 315 (1987).

This constraint upon the exercise of governmental power is a guarantee "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see also Penn Central Transportation Co. v. New York*, 438 U.S. 104 (1978).[3]

The right to just compensation does not depend upon the importance of the public policy underlying the regulation which results in a taking. "A strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).[4]

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[3] *American Savings and Loan Association v. County of Marin*, 653 F.2d 364, 372 n.1 (9th Cir. 1981) ("Courts faced with particular challenges to zoning measures must nonetheless ask whether those measures exact such a disproportionate sacrifice from individual property holders relative to their peers and to their expectations that the affected individuals may be seen as having been treated solely as a means in a process of social engineering."); *Pennell v. City of San Jose*, 485 U.S. 1, 9 (1988). (The Fifth Amendment's just compensation provision is designed to bar the government from foisting a disproportionate burden upon a particular group of individuals for a harm which is public and whose burden should be shared by the public as a whole.)

[4] In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the U.S. Supreme Court invalidated a building permit condition which would have allowed public access over the landowners' private (continued...)

Of course, not every exercise of regulatory authority constitutes a taking of private property. Whether a taking has occurred depends upon the extent to which the regulation impacts the owners' constitutionally protected property rights. "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal* at 415.

A. A Statute Which Deprives Property of All Economic Value Goes Too Far and Will be Recognized as a Taking

The plain meaning of the Takings Clause is that the government may not deprive the owner of the entire value of his property while withholding compensation. This principle is fundamental to the condemnation process, which recognizes the government's right to take part or all of the owner's private property but ensures that he will receive just compensation for it. The same principle applies where the government has taken physical possession of the property,

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[4] (...continued)
beach, saying:

> The Commission may well be right that [public access to the beach] is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. Rather, California is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for this 'public purpose' . . . but if it wants an easement across the Nollan's property, it must pay for it. *Id.* at 841-42.

rendering it valueless to the owner. *United States v. Causby*, 328 U.S. 256, 261 (1945); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). And a regulation "goes too far" when, like condemnation and physical possession, it empties the property of all value. *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394 (1989), *modified*, 20 Cl. Ct. 324 (1990), *aff'd*, 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied*, U.S. (1991).

A regulation which "goes too far" will be recognized as an unconstitutional taking. *Pennsylvania Coal v. Mahon*, *supra*. Certainly a regulation can go no farther than to eliminate the entire economic value from the property. Indeed, the market value of a parcel of property is a surrogate for the bundle of rights which is property ownership. When a property lacks economic value, the marketplace is affirming that the bundle of private property rights is empty or has been destroyed.[5/]

The United States Supreme Court has repeatedly held that the deprivation of a fundamental property right constitutes a

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[5/] Even nominal market value of property is an insufficient basis to preclude a finding of taking when all viable economic activity has been destroyed. "There are invariably speculators willing to gamble that even the most severe restrictions will eventually be lifted or modified so as to render the property usable again. If the existence of such a residual market for the property could defeat a claim for a regulatory taking, no regulatory taking could ever be proved and the concept would be rendered meaningless. In fact, when courts have determined that property has been rendered unfit for economically viable activity, they have found a Fifth Amendment taking even though the property obviously continued to have market value." *Florida Rock Industries, Inc. v. United States*, 8 Cl. Ct. 160, 167 (1985).

taking. Describing the incidents of property ownership as a "bundle of sticks," the Court has cautioned that "the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Andrus v. Allard*, 44 U.S. 51, 66 (1979). However, a regulation which deprived an Indian of the "right to pass on property -- to one's family in particular -- [which] has been part of the Anglo-American legal system since feudal times" so impairs this bundle of rights as to constitute an invalid taking without just compensation. *Hodel v. Irving*, 481 U.S. 704, 717 (1987). Likewise, the assertion by the United States of a navigational easement over a formerly private waterway unconstitutionally deprived the owner of "one of the most essential sticks in the bundle of rights that are commonly characterized as property -- the right to exclude others." *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). *See also Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (deprivation of the right to exclude public from owner's private beach constitutes a taking).

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), this Court invalidated a city ordinance which required installation of a cable television receiver box on all apartment buildings in New York. Characterizing the installation of the box as a physical invasion, the Court found that this invasion "chops through the bundle taking a slice of every strand." *Id.* at 437. "[T]he permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessary use of the property. Although deprecation of the right to use and obtain a profit from property is not, in ever case, independently sufficient to establish a taking (citations omitted), it is clearly relevant." *Id.*

In *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394 (1989), *modified*, 20 Cl. Ct. 324 (1990), *aff'd* 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied*, U.S. (1991), a statute prohibiting the mining of a coal deposit was recognized as a taking of the entire economic value of the coal.

> This case presents a dispute where a proper government purpose, protecting agricultural land, must be balanced against the absolute diminution in value of the property at issue that the court has found. Logically, when a diminution in value is absolute, a taking is more easily found. . . . In the case at hand, the diminution in property value is total, and there is no public interest in causing plaintiffs to solely bear the burden of maintain[ing] the AVF [alluvial valley floor] protected by SMCRA.

Id. at 406.

Finally, in *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990), a denial of a permit to fill the plaintiff's property was recognized as a taking because it took virtually the entire value of the land:

> The location of the lot makes it improbable that a single home would be built on, it is more likely than not that this acre will remain an empty lot, and therefore although it was not included in the permit application, the denial of the permit effectively renders this acre without economically viable use, as well as the 11.5 acres of wetlands."

Id. at 159. *See also Florida Rock Industries, Inc. v. United States*, 8 Cl. Ct. 160, 179 (1985) ("[W]hen government treats

private land as if it were its own, ignoring the interest of the property owner and rendering the property economically useless, it has worked a taking and, under our Constitution, compensation is due.").

B. Lucas Has Been Deprived of All the Economic Value of The Property

In 1986 when David Lucas bought the two undeveloped oceanfront lots in the Wild Dunes Development on the Isle of Palms in Charleston County, South Carolina, Mr. Lucas had every intention of building on the lots -- a home for himself and another for sale -- and at that time, there was no legal impediment to the single-family residential development by the state, county or municipality. *Tr. Ct. at 1-2.* Mr. Lucas paid $475,000 for one lot and $500,000 for the other. *Tr. Ct. at 1.*

As a result of the passage of the Coastal Zone Management Act of 1988, with its attendant setback lines along the entire coast, Mr. Lucas' lots will now remain "forever undeveloped." *Tr. Ct. at 2.* The trial court found that, as a result of these building restrictions, Mr. Lucas is deprived

> of any reasonable economic use of the lots, [which] has eliminated the unrestricted right of use, and renders them valueless. *Tr. Ct. at 5.*

Thus, Mr. Lucas has, like the property owner in *Loveladies Harbor*, been simply left with empty lots which are destined to remain so. There is no question that Lucas has lost his investment and is left with property totally devoid of value. There is no question that this statute has gone too far, and

indeed, could go no farther than taking all economic value of Mr. Lucas' property. Therefore,

> the interference with [Lucas'] property is of such a magnitude that "there must be an exercise of eminent domain and compensation to sustain [it]." *Penn Central Transportation Co. v. New York*, 438 U.S. 104, 136 (1978) *quoting Pennsylvania Coal*, 260 U.S. at 413.

The legitimacy of the exercise of the police power is not at issue here. It is only legitimate exercises of police power which implicate the Fifth Amendment. *Nollan v. California Coastal Commission*, 483 U.S. 825, 841-42 (1987).

II. The Government Bears the Burden of Proving a Nuisance Defense to a Takings Claim

The South Carolina Supreme Court was correct when it stated that one may not use one's property so as to damage others. Conceptualizing this a little differently, the use of one's property so as to harm others is not a legitimate property right and, therefore, cannot be taken. *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, n.20 (1987). However, the South Carolina Supreme Court's reliance upon *Mugler v. Kansas*, 123 U.S. 623 (1887) and other cases in which this Court has found the nuisance exception applicable, is misplaced. In *Mugler*, this Court established the "noxious use" doctrine as a narrow exception to the Fifth Amendment taking clause mandate for those instances where the proposed use of property involves quite profound and immediate adverse physical effects upon the health, safety or welfare of others. *E.g., Keystone Bituminous Ass'n. v. DeBenedictis*, 480 U.S. 470 (1987) (subsidence threatening buildings and ground water) and

Miller v. Schoene, 276 U.S. 272 (1928) (state action to destroy certain trees carrying infectious disease hazardous to principal agricultural crop in Virginia).

But the validity of a nuisance defense cannot be determined by legislative pronouncements alone.[6] The mere passage of a statute outlawing certain activity does not determine whether a nuisance exists at the particular property.[7] First, government cannot be allowed to define property rights out of existence simply by calling otherwise legitimate uses of property a nuisance. *Cf., Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893).

> It does not rest with the public, taking the property, through Congress or the legislature, its representatives, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that

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[6] *Cf Loveladies Harbor, Inc. v. United States*, 15 C. Ct. 375, 388 (1988), where Court stated that "the mere fact that the governmental regulation was intended to promote a public benefit is not sufficient to [determine whether the regulation substantially advances a public purpose.] This determination must also involve the Court's weighing of that intended public benefit against the harm inflicted upon the landowner involved." *Quoting Agins v. City of Tiburon*, 447 U.S. at 261.

[7] This is not to say that the legislature cannot decree that certain activities injurious to public health and safety (*e.g.*, maintaining a facility for producing illegal drugs) constitute a *per se* nuisance. However, the Court must ascertain whether the activity actually falls within the common law notion of "nuisance," and may not simply accept the proposition that a formerly lawful activity is a "nuisance" merely because the legislature says it is.

> just compensation shall be paid, and the ascertainment of that is a judicial inquiry.

Id. at 327. Otherwise, the existence of particular property rights would be dependent upon legislative grace rather than being constitutionally protected against public seizure without just compensation. *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394 (1989), *modified*, 20 Cl. Ct. 324 (1990), *aff'd* 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied*, U.S. (1991) (Enactment of SMCRA which deprived owner of all value of property is a taking); *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989) ("[L]egislature cannot simply alter these long-established property rights to accommodate new recreational needs.").

Second, the legislative branch is institutionally incapable of performing the judicial function of weighing the evidence necessary to determine whether the proposed use of the particular parcel of property will constitute a nuisance.[8] Whether a particular proposed use would constitute a threat of injury to others (*i.e.*, a nuisance) cannot be resolved in the present case by a general proposition that all coastline development is deleterious. Such coastline development has traditionally been permitted and even encouraged in South Carolina and elsewhere in our nation; hence, it has not traditionally been characterized as a nuisance. Thus, this landowner is entitled to notice and a judicial hearing to ascertain whether, on the facts of his particular case, the outlawed activity is a constitutionally-protected fundamental property right or (as contended here) an unprotected nuisance.

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[8] *But see* n.7 *supra* to statutes defining *per se* nuisances.

> Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case."

Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1977), *citing United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958). Moreover, if the legislature could take private property without notice and hearing, then serious due process concerns are implicated. As indicated by the court in *Florida Rock*, 8 Cl. Ct. at 171:

> [S]imple invocation of the term pollution cannot foreclose a plaintiff's right to compensation under the Fifth Amendment. "[M]ere labels" of this sort afford "no talismanic immunity from Constitutional limitations." (citations omitted) Government may not circumvent the takings clause by defining activity as noxious by fiat. . . . To avoid the payment of compensation on this theory, the government must show that the prohibited activity in fact causes harm.

Thus, the court, and not the legislature, is the appropriate forum in which to determine whether a nuisance exists. The government bears the burden of proving such a nuisance defense. *Cf., Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. at 154-58. The South Carolina Coastal Council failed to sustain this burden, choosing to rely instead on the legislative findings supporting the statute. Since those legislative findings, standing alone, do not constitute sufficient evidence to sustain the burden of proving the existence of a nuisance on the facts *of this particular case*,

the opinion of the South Carolina Supreme Court must be reversed.

CONCLUSION

Petitioner has proved a taking by demonstrating that he has been deprived of all of the economic value of his property. Respondent has failed to prove the existence of a nuisance defense.

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

Nancie G. Marzulla
President and Chief
Legal Counsel
6235 33rd Street, N.W.
Washington, D.C. 20015
(202) 686-4197

Counsel for *Amici Curiae*

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No. 91-453

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

DAVID H. LUCAS,
Petitioner
v.
SOUTH CAROLINA COASTAL COUNCIL,
Respondent

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

STEPHEN A. BOKAT
Counsel of Record
ROBIN S. CONRAD
MONA C. ZEIBERG
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Of Counsel:

HERBERT L. FENSTER
TAMI LYN AZORSKY
McKENNA & CUNEO
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-7500

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether landowners are entitled to compensation under the Fifth Amendment to the U.S. Constitution when the government bars development in the interest of public safety.

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") respectfully submits this brief *amicus curiae* in support of petitioner, David H. Lucas.[1] The Chamber is the largest federation of business companies and associations in the world. With substantial membership in each of the 50 states, the Chamber represents nearly 180,000 businesses and organizations and serves as the principal voice of the American business community. An important function of the Chamber is to

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[1] Both petitioner and respondent have consented to the Chamber's filing of this brief. The parties' consent letters are being filed simultaneously with this brief.

represent the interests of its members in important matters before this Court, the lower courts, the United States Congress, the Executive Branch and independent regulatory agencies of the federal government. Accordingly, the Chamber has sought to advance those interests by filing briefs in cases of importance to the business community addressed by this Court. *E.g.*, *Pacific Mutual* v. *Haslip*, 111 S.Ct. 1032 (1991), *Gilmer* v. *Interstate/Johnson Lane*, 111 S.Ct. 1647 (1991) and *NLRB* v. *Curtin Matheson Scientific*, 110 S.Ct. 1542 (1990).

Real property is a substantial asset of many of the Chamber's members. In the case of small business, which represent the vast majority of the Chamber's membership, *real* property may be the most substantial asset of the business. Thus, the question presented by the instant case—whether landowners are entitled to compensation under the Fifth Amendment of the United States Constitution when the government undertakes a regulatory taking—is of great concern to all Chamber members. These members take issue with the "bright-line" test established by the South Carolina Supreme Court, which allows governments to evade the constitutional obligation of just compensation merely by proving it is acting pursuant to legitimate police powers. As owners of commercial property, Chamber members take issue with the decision of the South Carolina Supreme Court, which forces property owners to bear the economic burdens of government action taken for the public good. The Chamber has a strong interest in the constitutional protection of the property rights of its membership.

STATEMENT OF THE CASE

Petitioner, David H. Lucas, purchased two lots on the Isle of Palms, Charleston County, South Carolina in 1986. Both lots were zoned for single-family residential use. Lucas intended to build a house on each property, one for his own family and one for resale.

In 1988, South Carolina passed the Beachfront Management Act, S.C. Code Ann. Section 48-39-10 *et seq.* (1990 Cum. Supp.) ("the Act"). The Act was designed to protect critical areas of South Carolina's beach and dune system by limiting construction along the coastline. Pursuant to the Act, the respondent, South Carolina Coastal Council, drew baseline and setback lines along the South Carolina coast. A setback line was drawn behind Lucas's properties, precluding him from building anything more than a small deck or walkway.

Lucas filed an action in the Circuit Court of Charleston County claiming that the Act amounted to a "taking" of his property without just compensation in violation of the South Carolina and United States Constitutions. The Circuit Court agreed and awarded Lucas more than a million dollars in damages. On appeal, the Supreme Court of South Carolina reversed.

SUMMARY OF ARGUMENT

The decision of the Supreme Court of South Carolina should be reversed because, contrary to this Court's rulings, it forces private property owners to bear the cost of government regulations that benefit society as a whole. Regulations that "go too far" can effect a taking of property for which compensation is due under the Fifth Amendment. *Pennsylvania Coal* v. *Mahon*, 260 U.S. 393 (1922). This Court answers the question of whether a regulation goes "too far," and compensation is due, by analyzing the nature of the interference with private property and weighing it against the public purpose of the regulation. The South Carolina Supreme Court ignored this approach.

The South Carolina court's decision precludes compensation where the state acts pursuant to legitimate police powers, regardless of the economic harm to the property owner. By doing so, the court equates legitimate exercise of police power with abatement of a nuisance, mis-

reading this Court's decision in *Mugler* v. *Kansas*, 123 U.S. 623 (1887). Thus, under the South Carolina court's ruling, only *illegitimate* exercises of a government's power require compensation to the property owner.

The Chamber urges this Court to clarify its long-standing test used for determining whether compensation must be paid for a regulatory taking. The Chamber proposes a rule that requires examination of both the nature of the regulation *and* the nature of the interference with property rights. Regulations that abate a nuisance—the noxious use of property—have, by nature, a very different objective than regulations that serve legitimate public purposes. While the government should be able to adversely affect the value of property that causes harm to others, it should not be able to single-out private property owners to bear the burden of legitimate regulation that promotes the public good.

Moreover, the compensation to be paid to a property owner should equal that owner's reasonable investment backed expectation in the property, including any expenditures toward a goal subsequently prevented by the government action at issue. This proposed rule only provides compensation for actual harm or loss to the property, not future expected profits or value. In addition, by using this measure, this Court can "make a property owner whole" without awarding compensation for speculative economic interests.

For these reasons, the Chamber urges this Court to reverse the decision of the Supreme Court of South Carolina.

ARGUMENT

I. THE SOUTH CAROLINA SUPREME COURT'S DECISION CONFLICTS WITH THE RULINGS OF THIS COURT.

A. This Court's Rulings Recognize that the Government Must Compensate Individuals Adversely Affected By Regulations that Benefit Society As A Whole.

The Fifth Amendment prohibits the government from taking private property without just compensation. This prohibition was initially applied only where the government physically occupied or appropriated private property. Subsequently, this Court recognized that "non-acquisitive" government action—such as the promulgation of a regulation—may amount to a taking for which compensation should be paid. *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922).

Discussion of this Court's takings analysis begins with *Mugler* v. *Kansas*, 123 U.S. 623 (1887). In *Mugler*, the Court held that a state statute prohibiting the manufacture of liquor did not amount to a taking of the property of the beer manufacturer. According to the Court, the prohibitory regulation did not constitute a taking because no property had actually been physically appropriated by the state. The Court reasoned that a "prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot in any sense, be deemed a taking or appropriation of property for the public benefit." 123 U.S. 668-69. This is often referred to as the *Mugler* nuisance exception.

The focus of this Court's analysis in takings cases changed in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922), where the Court recognized that regulation could deprive a property owner of the economic value of his property as effectively as physical occupation. The Court,

in *Pennsylvania Coal*, invalidated the Kohler Act, a Pennsylvania statute prohibiting the mining of coal under certain circumstances. Indicating that the distinction between a "taking" and a "regulation" is one of degree, the Court stated: "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes *too far* it will be recognized as a taking." *Id.* at 415 (emphasis added). Public benefit is not sufficient justification to deprive a property owner of his land without compensation: ". . . a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." 260 U.S. at 416. In *Pennsylvania Coal*, this Court recognized that any inquiry concerning the effect of a regulation, regardless of its validity, must focus on the nature of the interference with property ownership.

Whether a regulation goes too far—and becomes a taking for which compensation is due—has been the subject of considerable discussion since *Pennsylvania Coal*. For the most part, the post-*Pennsylvania Coal* decisions have determined whether a compensable taking has occurred by weighing the public interest fostered by a regulation against the private economic harm caused by it. Accordingly, in *Penn Central Transportation Co.* v. *New York*, 438 U.S. 104 (1978), this Court upheld a New York City Landmark Preservation Law, which prevented the plaintiff from destroying or altering its property, Grand Central Terminal. The Court pointed to the following factors in determining whether compensation is due under the takings clause: the extent to which the regulation has interfered with an investment backed expectation, and the character of the governmental action. 438 U.S. at 124. The Court established that where the regulatory purpose significantly advances an important governmental interest, and the loss of value to the property owner is minimal, compensation is not due. This analysis

suggests that if the loss of value to the property owner is greater, compensation is required.

Indeed, the dissent in *Penn Central* concluded that the property owners had suffered a considerable diminution in the value of their land, enough to constitute a taking. More importantly, though, for purposes of understanding the South Carolina court's decision, the dissent made reference to the *Mugler* nuisance exception. The dissent stated that "As early as 1887, the Court recognized that the government can prevent a property owner from using his property to injure others without having to compensate the owner for the value of the forbidden use." 438 U.S. 104, 143 (citing *Mugler* v. *Kansas*, 123 U.S. 623 (1887)). The dissent, however, went on to say that since there was no nuisance in *Penn Central*, compensation was due.

Most recently, this Court developed a two-part test for determining whether a regulatory taking has occurred. According to the Court, "a regulation can effect a taking if it 'does not substantially advance legitimate state interests, . . . or denies an owner economically viable use of his land.'" *Keystone Bituminous Coal Association* v. *DeBenedictis*, 480 U.S. 470, 485 (1987) (quoting *Agins* v. *Tiburon*, 447 U.S. 255 (1980)). The statute at issue in *Keystone* required coal mine operators to leave fifty percent of the coal located under the ground to support surface structures. The Court weighed the public purpose of the statute (protecting the state's health, safety, conservation and fiscal integrity) against its burden on the property owner (no sufficient diminution in value because of the limited value of the coal involved) and determined that no compensation was due. Thus, very recently this Court has recognized the need to weigh the nature of the regulation against the value of the property destroyed.

B. The South Carolina Supreme Court's Expansion of the Nuisance Exception Eviscerates the Takings Clause.

In the present case, the South Carolina Supreme Court held that the South Carolina Beachfront Management Act did not effect a regulatory taking of petitioner's coastal property. The court emphasized that since the regulation was enacted pursuant to legitimate state police powers, just compensation was not due. To support its reasoning, the court drew upon the "nuisance exception" originally described in *Mugler* v. *Kansas*, 123 U.S. 623 (1887), and referred to in the dissent in *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978). According to the court, state actions which are designed to protect against serious public harm, such as promulgation of the Beachfront Management Act, do not effect a taking under the Fifth Amendment. By equating any legitimate exercise of police power with a nuisance, the court failed to even examine the economic harm suffered by the petitioner.

The South Carolina Supreme Court read *Mugler* together with *Keystone* to virtually preclude compensation when the state acts pursuant to a legitimate police power. The consequence of this analysis is to equate any exercise of police power with the abatement of a nuisance, and thereby preclude compensation for anything but an illegitimate exercise of police power. This analysis ignores the warning enunciated in *Pennsylvania Coal* that even legitimate regulations that go "too far" amount to a taking. 260 U.S. at 415. It allows the government to place the financial burden of a regulation, that benefits society as a whole, on a limited group of property owners.

The nuisance exception to the takings clause allows the government to prevent misuse or illegal use of property. *Curtin* v. *Benson*, 222 U.S. 78 (1911). The South Carolina court has expanded the exception to swallow the rule by holding, in effect, that all statutes justified by a state's police power fit the exception. This holding eviscerates

the long-standing rule that the government must compensate those whose legitimate property interests are diminished by legitimate regulation. This Court specifically rejected this position in *Keystone* when it said that the "(nuisance) exception is not coterminous with the police power." 480 U.S. at 490-492.

Contrary to the holding in *Keystone*, the South Carolina Supreme Court's analysis assumes that the effects of only *illegitimate* regulation require compensation. The South Carolina Supreme Court's decision requires claimants to challenge the legitimacy of a regulation before a successful claim for a taking can be made. This approach is flawed for two reasons: first, it presumes that all exercises of a state's power are directed against nuisances; and second, it ignores the reality that a regulation may at the same time legitimately advance a state interest and deprive a property owner of the economic use of his land. This Court has recognized that regulatory takings should not be accomplished at the expense of property owners who must ". . . bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *U.S.*, 363 U.S. 40, 49 (1960).

II. THIS COURT SHOULD CLARIFY THE LONG-STANDING TEST THAT WEIGHS THE PUBLIC PURPOSE OF A REGULATION AGAINST A PROPERTY OWNER'S LOSS OF REASONABLE INVESTMENT BACKED EXPECTATIONS IN THE PROPERTY.

A. The Court Should Differentiate Between A Regulation That Serves A Public Purpose and One That Abates A Nuisance.

The first prong of the Chamber's proposed test for determining whether a regulatory taking has occurred considers the public purpose of the regulation. As part of this test, the Chamber urges this Court to make two definitive statements: first, that the nuisance exception is narrower than the exercise of legitimate police power; and second, that the government, in exercising its legiti-

mate police powers, must proceed by the constitutional mechanism of paying for a regulation's effect on the rights of owners of property.

The government should be given its greatest authority when it acts to prohibit a nuisance—the noxious use of property. However, as the dissent in *Keystone* pointed out, the term "nuisance" must be narrowly construed. The government acts to prohibit a nuisance when ". . . it exercises its unquestioned authority to prevent a property owner from using his property to injure others." 480 U.S. at 511-12 (citing *Goldblatt* v. *Hempstead*, 369 U.S. 590 (1962), *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915), *Mugler* v. *Kansas*, 123 U.S. 623 (1887)). Thus, it is acceptable for the government to adversely affect the economic value of property that causes harm to others.

The nuisance exception should be limited to cases in which the economic value allegedly affected is the nuisance; for example, the sale of intoxicating liquors in *Mugler* or the coal that supported the surface in *Keystone*. This Court previously recognized that any broad exception improperly imposes society's burdens on a few individual property owners. *Keystone* at 513. "A broad exception to the Just Compensation Clause based on the exercise of multifaceted health, welfare, and safety regulations would surely allow government much greater authority than we have recognized to impose societal burdens on individual landowners, for nearly every action the government takes is intended to secure for the public an extra measure of 'health, safety, and welfare.'" *Id.* Only by restricting the nuisance exception to include the most injurious use of property, and only those situations where the economic value affected is the direct result of the nuisance itself, can this Court protect against an exception that would engulf the takings clause.

Second, exercises of *legitimate* government police power can still effect a taking, for which compensation is due. Property owner's should not bear the cost of government action which benefits the public as a whole. In the present

case, because the petitioner did not challenge the validity of the Beachfront Management Act, the South Carolina Supreme Court assumed that the Act was designed to prohibit noxious use of the coastal property. This Court has long recognized that just compensation must be paid for property taken by legitimate state regulation. *Pennsylvania Coal* at 415. The theory behind the rule is that a few should not have to pay for a benefit to society as a whole. Therefore, the property owner should be able to concede the public good of a particular regulation without being singled-out for the cost of achieving that public good.

B. Property Owners Affected By Regulations Enacted For the Public Good Should Be Compensated For Their Loss of Reasonable Investment Backed Expectations.

The Chamber proposes a rule that requires an examination of both the nature of the regulation *and* the nature of the interference with property rights. The government should have great authority to regulate nuisances without compensating those who create the nuisance. On the other hand, the government should be required to compensate innocent property owners whose property does not constitute a nuisance, but who bear the economic brunt of regulation intended to benefit the public condition. The compensation to be paid should equal the property owner's reasonable investment backed expectation, which the Chamber proposes be defined as investment in the property, including any expenditures toward a goal subsequently prevented by the government action at issue.

The proposed rule recognizes that there are certain instances in which the economic burden of a legitimate regulation is so unequally distributed that, however compelling the purpose of the regulation, compensation should be paid. This is one such instance. Petitioner purchased two beachfront lots on the Isle of Palms, South Carolina with the intention of building two homes on the property.

After he purchased the property, South Carolina enacted the Beachfront Management Act, which prevents petitioner from building on the property. As a result, petitioner's lots became essentially valueless. Unless petitioner receives compensation for the loss of value of his property, he will be forced to bear individually the economic burden of a regulation that was enacted to serve the public good.

This case features a total taking by the government. There is no dispute that the effect of the Beachfront Management Act was to deprive Mr. Lucas of the entire value of his coastal property. The Court should, however, recognize that most cases involve regulations which fall short of a total deprivation of property, and the Court may wish to provide guidance for these situations as well. The Chamber encourages this Court to recognize that the government, acting pursuant to legitimate police power, may cause a property owner to suffer a partial loss in value of his property, measured by a loss of reasonable investment backed expectations, and that the loss should be compensated. In *Ruckelshaus* v. *Monsanto*, 467 U.S. 986 (1984), this Court determined that a pesticide producer had a property interest protected by the Fifth Amendment in environmental data submitted to the EPA, and that the producer was entitled to compensation for the taking of that property for a six-year time period. In doing so, the Court identified "interference with reasonable investment backed expectations" as one factor, among others, that should be considered when determing whether a regulatory taking has been effected and compensation is due. 467 U.S. at 1005.

The measure of compensation the Chamber proposes is based on actual loss or injury to the property owner. In *Ruckelshaus*, this Court recognized that a " 'reasonable investment backed expectation' must be more than a 'unilateral expectation or an abstract need.' " 467 U.S. at 1005. When government regulations restrict a property owners use of his land, compensation that replaces the

loss sustained—not future expected profits or value—should be awarded. For example, assume Mr. X owns ten acres of land. On two acres, he operates a commercial stable where he boards ten horses. The remaining eight acres are for Mr. X's residential use. Further, assume that Mr. X just contracted with a builder to expand the stable and has purchased building materials. Suppose, as a means of reducing traffic congestion and overcrowding, a regulation is enacted precluding commercial buildings in Mr. X's neighborhood. Mr. X claims he is owed compensation for the taking of his commercial property. Under the Chamber's proposed test, Mr. X's reasonable investment backed expectations concerning the stables, includes such factors as the value of the equipment in the stable, the value of the building materials purchased, any payments to the builder, and the appraised loss of value of an operating commercial stable such as the one in existence prior to the enactment of the regulation. However, any compensation is limited by alternative uses of the property. By factoring alternatives uses of the property into the compensation, Mr. X receives sufficient compensation to "make him whole," but does not receive payment for speculative economic interests.

Thus, as seen from this example, the Chamber's proposed rule accomplishes two important goals. First, the rule compensates property owners only for actual harm or loss to their property, not future expected harm or value. And, second, the rule saves property owners from bearing the brunt of a regulation that promotes the public good.

CONCLUSION

For the reasons stated above, the Chamber of Commerce of the United States of America respectfully urges this Court to reverse the decision of the Supreme Court of South Carolina.

Respectfully submitted,

STEPHEN A. BOKAT
Counsel of Record
ROBIN S. CONRAD
MONA C. ZEIBERG
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Of Counsel:

HERBERT L. FENSTER
TAMI LYN AZORSKY
MCKENNA & CUNEO
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-7500

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DAVID H. LUCAS,

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v.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

ON WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

BRIEF FOR UNITED STATES SENATOR STEVE SYMMS, UNITED STATES SENATOR LARRY E. CRAIG, UNITED STATES SENATOR DON NICKLES, AND UNITED STATES SENATOR CONRAD BURNS AS AMICUS CURIAE SUPPORTING PETITIONER

PETER B. DICKSON
Counsel of Record
SAM KALEN

HOWARD E. SHAPIRO
D. ERIC HULTMAN
RICHARD A. AGNEW
Van Ness, Feldman & Curtis
A Professional Corporation
1050 Thomas Jefferson St., N.W
Seventh Floor
Washington, D.C. 20007
(202) 298-1800

January 2, 1992

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In the Supreme Court of the United States

October Term, 1991

No. 91-453

DAVID H. LUCAS,

Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

ON WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

BRIEF FOR UNITED STATES SENATOR STEVE SYMMS, UNITED STATES SENATOR LARRY E. CRAIG, UNITED STATES SENATOR DON NICKLES, AND UNITED STATES SENATOR CONRAD BURNS AS AMICUS CURIAE SUPPORTING PETITIONER

QUESTION PRESENTED

Does a land-use regulation, pursuant to a State's police power, require compensation under the Constitution's Fifth Amendment if it totally eliminates the value of private property?

INTEREST OF AMICUS CURIAE

Amici are sitting United States Senators, duly elected and sworn to represent the citizens and interests of their respective States. As members of the legislative branch of the Federal government, *amici* are acutely interested in matters affecting the Constitutional right to just compensation when private property is taken for a public use.

SUMMARY OF ARGUMENT

The South Carolina Supreme Court held that Petitioner Lucas is not entitled to just compensation under the United States Constitution even though the South Carolina Beachfront Management Act, as applied, denied Mr. Lucas of all economically viable use of his property. The state supreme court concluded that just compensation was not required on the sole basis that the statute had a valid public purpose.

The court's decision denies Lucas his fundamental right to just compensation. This Court has consistently maintained that private property cannot be taken for a public use, except upon payment of just compensation. The Court's decisions since the adoption of the Constitution confirm that, while States may appropriately regulate and prohibit certain conduct and use of property, just compensation is required when private property is appropriated for a public use.

By effectively creating an exception that would allow the taking of private property without compensation simply because the State acts pursuant to a valid public purpose, the lower court ignored this Court's decisions requiring that a "takings" analysis consider the impact on private property. The appropriate test for a regulatory taking includes not only the element of the public purpose but also the element of the impact on affected property.

ARGUMENT

I. Just Compensation Must Be Paid When A Regulation Denies An Owner All Economically Viable Use Of The Property.

A. As Found by the Court Below, the Beachfront Management Act Destroyed All Economically Viable Use of the Property.

The South Carolina Supreme Court held that petitioner Lucas was not entitled to just compensation even though South Carolina's Beachfront Management Act of 1988,[1] as applied, denied petitioner all economically viable use of his property.[2] The Court of Common Pleas found that the setback lines drawn by respondent South Carolina Coastal Council ("Council") rendered Lucas' two lots, which were otherwise suitable for single-family residential development, valueless and, therefore, awarded compensation. The Council appealed to the state supreme court, which stated that the issue was "whether governmental regulation of the use of property, in order to prevent serious public harm, amounts to a 'regulatory taking' of property for which compensation must be paid." *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C. 1991).

The South Carolina Supreme Court held that there was no regulatory taking, even though it left undisturbed the trial court's finding that the property no longer had economic value. It effectively held that a taking does not occur when a valid regulation serves to prevent serious public harm, relying upon this Court's decision in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), as well as *Mugler v. Kansas*, 123 U.S. 623 (1887); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Miller v. Schoene*, 276 U.S. 272 (1928); and *Goldblatt v. Hempstead*, 369 U.S. 590 (1962). Since, in this case Lucas did not challenge the validity of the Act, the court concluded that compensation is not constitutionally required.

This holding is inconsistent with the constitutional guarantee in the Fifth Amendment, which is applicable to the States through the Fourteenth Amendment, that private property shall not be taken except for a public use and upon payment of just compensation.

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[1] S.C. Code Ann. § 48-39-10 *et seq.*

[2] *Amicus curiae* do not address the effect of the 1990 amendment to the Beachfront Management Act.

B. The Just Compensation Clause was Intended to Secure a Fundamental Right.

The protection from an uncompensated taking of private property is a fundamental right guaranteed by our Constitution. During the framing of the Constitution, the people were deemed to have an inalienable right to property--that is, a natural right to acquire, dispose of and use property.[3] John Locke had explained that the primary function of government is to preserve that inalienable right to property.[4] Writing roughly seventy-five years after Locke, Sir William Blackstone similarly commented that the preservation of vested property rights is the chief end of government; and, when a property right is taken for the public good, it must be accompanied by the payment of compensation.[5]

A student of this period has observed that "[t]he great focus of the Framers was the security of basic rights, property in particular. . . ."[6] Indeed, in Federalist No. 10, James Madison wrote that the protection of "the diversity in the faculties of men, from which the rights of property originate,...is the first object of government."[7] To secure

[3]In *VanHorne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 310 (1795), Justice Patterson observed that "it is evident: that the right of acquiring and possessing property and having it protected, is one of the natural inherent and unalienable rights of man." *See generally* Federalist No. 10 (Madison); Grant, *The "Higher Law" Background of the Law of Eminent Domain*, 1931 Wisc. L. Rev. 67. *See also* Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. Rev. 273 (1991); Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 Wisc. L. Rev. 1135; Fisher, *Ideology, Religion, and the Constitutional Protection of Private Property: 1760-1860*, 39 Emory L. J. 65 (1990).

[4]J. Locke, *Two Treatises of Gov't* 323 (Peter Laslett ed. student ed. 1988).

[5]2 W. Blackstone, *Comm. on the Laws of England* 4. When exercising its eminent domain power, Parliament indulgently acts and must provide "a full indemnification and equivalent for the injury thereby sustained." 1 W. Blackstone, *Comm. on the Laws of England* 135.

[6]J. Nedelsky, *Private Property and the Limits of American Constitutionalism* 92 (1990). Madison believed that "[t]he rights of property were based on natural rights." *Id.* at 35.

[7]The Federalist Papers No. 10, at 78 (Madison) (Clinton Rossiter ed., 1961).

this protection, Madison introduced the clause in the Fifth Amendment: "nor shall private property be taken for public use, without just compensation."[8] Not surprisingly, therefore, during the nation's formative years the requirement of just compensation was often justified on the basis of fundamental or natural law.[9]

C. There is No Historical Basis For an Exception to the Just Compensation Clause.

Protecting property rights against uncompensated appropriations has remained a dominant theme throughout the development of our constitutional jurisprudence. A prominent legal historian notes that the period from 1789-1910 marks a "broad tendency to stress the stability of property rights in the American Legal Order."[10] Despite Chief Justice Marshall's opinion in *Barron v. The Mayor & City Council of Baltimore*, 32 U.S. (7 Pet.) 243 (1833), holding that the Fifth Amendment to the United States Constitution did not apply to the States, the Court's decisions prior to the adoption of the

[8]Nedelsky, *supra*, at 29; Treanor, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L. J. 694 (1985).

[9]*E.g.*, *Henry v. Dubuque*, 10 Iowa 540 (1860); *Sinneckson v. Johnson*, 17 N.J.L. 129 (1839); *Gardner v. Village of Newburg*, 2 Johns. Ch. 162 (N.Y. 1816). *See generally* M. Horwitz, *The Transformation of American Law 1780-1860* (1977); Grant, *supra*; Scheiber, *Instrumentalism and Property Rights: A Reconsideration of American "Styles of Judicial Reasoning" in the 19th Century*, 1975 Wisc. L. Rev. 1; Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553 (1972).

[10]Scheiber, *Property Law, Expropriation, and Resource Allocation by Government, 1789-1910*, *reprinted in* L. Friedman & H. Scheiber, American Law and the Constitutional Order 132 (1978).

Fourteenth Amendment nevertheless repeatedly confirmed that private property could not be taken without just compensation.[11]

In its first opinion on the eminent domain power,[12] the Court held that a State could exercise this power against a corporate franchise. *West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507 (1848). In 1795, Vermont had granted the West River Bridge Company the exclusive right to build and operate a toll bridge along the West River. Forty-four years later, the State passed an internal improvement act sanctioning further development along the river, conditioned upon the payment of compensation for the taking of any property (including franchises). The West River Bridge Company challenged the new statute, claiming that the State could not, under the pretext of the eminent domain power, abrogate its contractual obligation with the company by taking its franchise right, even though it afforded compensation. 47 U.S. at 531. The Court upheld the exercise of the power as a necessary incident to sovereignty. In a separate concurrence, Justice Woodbury demonstrated that the weight of authority sanctioned the use of the eminent domain power, but only upon payment of compensation. 47 U.S. at 539-49.

Freedom from uncompensated takings of private property became the subject of extensive litigation during the period of economic

[11]Early decisions concerning the protection of private property focused on the constitutional prohibition against impairing contracts. It is now well accepted that decisions during the Marshall Court protected vested property rights from encroachment. *See Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810). *See generally* C.P. Magrath, *Yazoo, Law and Politics in the New Republic: The Case of Fletcher v. Peck* 102 (1966) ("The Court's decision [in *Fletcher v. Peck*] elevated vested property to a position of primacy in the hierarchy of American constitutional values."). Under Chief Justice Taney, the Court continued to protect property interests, but its decisions reflected an expanding concept of property that incorporated economic change. *See Charles River Bridge Co. v. Warren River Bridge Co.*, 36 U.S. (11 Pet.) 420 (1837). *See generally* J.W. Hurst, *Law and the Conditions of Freedom in the Nineteenth Century United States* (1956); S. Kutler, *Privilege and Creative Destruction: The Charles River Bridge Case* (1971).

[12]*But cf. Respublica v. Sparhawk*, 1 U.S. (1 Dall.) 357 (1788) (whether compensation required for seizure of flour unreturned during the war).

expansion and increased regulatory activity following the Civil War.[13] State and local exercise of the expanding police power invariably affected private conduct and use of private property. As Justice Holmes would later observe, "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

The degree to which government could affect particular conduct and use of property became a principal focus of challenges to the exercise of the police power. Such challenges were based primarily on the newly adopted "due process" clause of the Fourteenth Amendment, which provided that "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Court noted that until the Fourteenth Amendment "[i]t has never been seriously contended that such laws raised any question growing out of the Constitution of the United States." *Bartemeyer v. Iowa*, 85 U.S. (18 Wall.) 129, 132 (1874). The Fourteenth Amendment, however, provided an opportunity for parties to press for further limitations on State action. In particular, the clause became viewed as a potential vehicle for curbing regulation of business activity, under the premise that the protection against deprivation of liberty and property without due process included the right to

[13]The focus quite often was on whether the eminent domain power could be delegated, or whether the power was being used for a private use, or the appropriate mechanism for determining compensation. *See, e.g., Otis Co. v. Ludlow Manufacturing Co.*, 201 U.S. 140 (1906) (upheld mill-dam statute, where compensation provided); *Clark v. Nash*, 198 U.S. 361 (1905) (whether valid condemnation for a public use); *Fallbrook Irrigation District v. Bradley*, 164 U.S. 112 (1896) (upheld delegation of eminent domain power to irrigation district); *Head v. Amoskeag Mfg. Co.*, 113 U.S. 9 (1885) (upheld mill-dam statute); *Cole v. City of La Grange*, 113 U.S. 1 (1885) (statute authorizing compensable taking of private property held not for a public use); *Boom Co. v. Patterson*, 98 U.S. 403, 406 (1879) (reconfirming inherent right of sovereign to exercise eminent domain power); *Mt. Holyoke Company v. Lyman*, 82 U.S. (15 Wall.) 500 (1873) (upheld claim of interference with fishery interest by construction of mill dam); *Kohl v. United States*, 91 U.S. 367 (1876) (upheld the Federal government's exercise of eminent domain power).

continue to engage in any activity lawful when first undertaken.[14]

The post-Civil War "due process" challenges were not based directly upon the Just Compensation Clause. Not until the late 1890s did the Court hold that the requirement of "due process of law" incorporated the concept of "just compensation."[15] *Chicago B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226 (1897); *see also Fallbrook Irrigation District v. Bradley*, 164 U.S. 112, 158, 161 (1896) (suggesting that "due process" includes considering whether property taken for a public use). Nevertheless, when resolving due process challenges prior to the incorporation of the Fifth Amendment, the Court often decided whether there was a "deprivation" of any protected "property" interest. As we next show, the Court's decisions defined two general categories of instances where no deprivation of property occurred. First, the Court ruled that damages resulting from regulation, without more, did not constitute a "deprivation" within the meaning of the Fourteenth Amendment. When governmental action neither regulated nor restricted the use of property, no *deprivation* occurred if the value of property was only indirectly and incidentally affected. Second, the Court ruled that property owners did not have any vested *property* interest in any particular continued use of property or in any particular conduct that interfered with the enjoyment of property by others.

1. Incidental Pecuniary Losses Did Not Constitute a "Deprivation" of Property.

The Court distinguished between the lawful exercise of the police power causing "incidental" or "consequential" damage and a "taking." Reviewing various earlier cases, the Court noted that they "recogniz[ed] . . . the distinction between an incidental injury to

[14]*See generally* H. Hovenkamp, *Enterprise and American Law 1836-1937* (1991); A. Paul, *Conservative Crisis and the Rule of Law: Attitudes of the Bench and Bar, 1887-1895* (1976); W. Swindler, *Court and Constitution in the 20th Century: The Old Legality 1889-1932* (1969).

[15]The requirement for just compensation was a limitation upon the use of the eminent domain power. *United States v. Jones*, 109 U.S. 513, 518 (1883). *Cf. Noble v. Union River Logging R. Co.*, 147 U.S. 165 (1893) (revocation of vested right-of-way without compensation held void).

rights of private property resulting from the exercise of governmental powers, lawfully and reasonably exerted for the public good, and the *taking*, within the meaning of the Constitution, of private property for public use." *Chicago B. & Q. R. Co. v. Illinois*, 200 U.S. 561, 583 (1906).

The Court held that governmental activity neither directly burdening private property nor regulating its use did not "take" any "property" interest. Landowners, for instance, could not claim any vested right in the continued maintenance of the status quo of surrounding land--*i.e.*, a status quo that, if changed, would diminish a particular landowner's property value. In an opinion written by Justice Brewer, an ardent defender of property rights,[16] the Court noted that the exercise of the police power was not rendered invalid simply because it worked pecuniary injury when the governmental action was unrelated to the use of private property. *L'Hote v. New Orleans*, 177 U.S. 587, 596-99 (1900) (upholding authorization of what otherwise might have been deemed a nuisance at common law). Thus, landowners whose property fronted streets, for example, failed to persuade the Court to hold unconstitutional changes in street grading. *Cf. Marchant v. Pennsylvania Railway Co.*, 153 U.S. 380 (1894); *City of Chicago v. Taylor*, 125 U.S. 161 (1888).[17]

Another common example of incidental damage occurred when governmentally authorized construction along navigable waterways incidentally affected riparian and other landowners. The Court held that the due process clause generally did not bar such an exercise of the police power. *See Manigault v. Springs*, 199 U.S. 473 (1905); *Bedford v. United States*, 192 U.S. 217 (1904); *Scranton v. Wheeler*,

[16]A. Paul, *supra*, at 70.

[17]Earlier decisions rejected landowners' attempts to effectively impose a negative servitude upon surrounding land, by arguing for compensation as a result of incidental activity unrelated to the use of the landowners' property. The Court held that "one cannot build his house on the top of a hill in the midst of a city, and require the grade of the street to conform to his convenience, at the expense of the public." *Smith v. The Corp. of Washington*, 61 U.S. (20 How.) 135, 148 (1858). *See Goszler v. Corp. of Georgetown*, 19 U.S. (6 Wheat.) 593 (1821); *City of Boston v. Lecraw*, 58 U.S. (17 How.) 426 (1855).

179 U.S. 141 (1900); *Eldridge v. Trezevant*, 160 U.S. 452 (1896).[18] The Court reasoned that such damages resulted from the "incidental consequence" of improvements on navigable highways, with the government exercising a dominant and pre-existing servitude, and did not constitute a taking of property. *Gibson v. United States*, 166 U.S. 269, 274-76 (1897) (congressionally authorized construction of dike in the Ohio river).

A good illustration is *Northern Transportation Co. of Ohio v. City of Chicago*, 99 U.S. 635 (1879). There, state-approved construction by the City of Chicago caused the interruption of a company's access to the Chicago river, where it maintained its dock and warehouse. The company brought a nuisance action against the city, claiming that it was entitled to compensation for consequential damages. 99 U.S. at 641. The Court rejected this argument, holding that "acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision." *Id.* at 642.

Conversely, in *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1872), the Court held that a taking occurred when there was a direct and substantial injury to property. There, the operation of a governmentally approved dam flooded certain private property, completely destroying its value. After rejecting statutory defenses and noting that the takings clause of the Fifth Amendment did not apply to the States, the Court examined the Wisconsin Constitution, which contained a just compensation provision similar to the Fifth Amendment; the Court noted that "this limitation on the exercise of the right of eminent domain is so essentially a part of American constitutional law that it is believed that no state is now without it. . . ." 80 U.S. at 177.[19] The Court then rejected the argument that the injury

[18]*Cf. Yates v. Milwaukee*, 77 U.S. (10 Wall.) 497 (1871) (compensation required upon removal of wharf, where no showing by city that wharf a nuisance or obstruction to navigation).

[19]Not until *Murdock v. The City of Memphis*, 87 U.S. (20 Wall.) 590 (1875), did the Court consider its jurisdiction over state law issues.

was consequential, and held that a taking could occur when there is a "serious interruption to the common and necessary use of property. . . ." 80 U.S. at 179. *See also Manigault v. Springs*, 199 U.S. 473, 484-85 (1905) ("where there is a practical destruction or material impairment of the value of plaintiff's lands, there is a taking which demands compensation").

2. Decisions Upholding the Exercise of the Police Power did not Sanction Uncompensated Takings.

The decisions upholding police power measures directly affecting private conduct and use of private property cannot be read as permitting the uncompensated taking of private property. In these cases, litigants frequently sought to establish a vested or property right in the status quo, often arguing that they were being deprived of a liberty or property interest when the exercise of the police power restrained their opportunity to engage in a particular conduct or previously allowed use of property.[20] Such arguments prompted the Court to focus on the scope of the police power as well as the nature and use of property, when considering a possible due process violation.[21] No "taking" of "private property" occurred when the exercise of the police power affected a change in the status quo--even though

[20]*See generally* A. Paul, *supra*. Although the majority in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873), rejected the argument that a restraint on the exercise of a trade constituted a deprivation of property, Justice Bradley believed otherwise. *Id.* at 127.

[21]The focus on the "use" of property supported the Court's conclusion in *Munn v. Illinois*, 94 U.S. 113 (1877), that businesses affected with the public interest could be regulated, and that such regulation did not deprive a company of property without due process of law. *See generally* Scheiber, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts, reprinted in* Perspectives in American History 329 (1971). However, such businesses could not be required to transfer their property to private individuals. *Missouri Pacific Railway Co. v. Nebraska*, 164 U.S. 403 (1896).

particular economic interests may have relied on that status quo.[22] It became axiomatic both that the legislature could not contract away the police power, *Boyd v. Alabama*, 94 U.S. 645 (1877) (lottery); *Stone v. Mississippi*, 101 U.S. 814 (1880) (same), and that "[n]o person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit." *New York R. C. Co. v. White*, 243 U.S. 188, 198 (1917). It was in this context that a commentator could confidently assert that "an act which came within the scope of the State police power could not be termed a deprivation of property."[23]

The Court held that States could constitutionally exercise their police power to regulate or prohibit an activity or use of property that interfered with any other persons' equal enjoyment in the use of their property. Such police power measures did not deprive an owner of any vested property interest without due process, because it had become well established that no person has the right to continue using property in such a way as to harm others. In *Bartemeyer v. Iowa*, 85 U.S. (18 Wall.) 129 (1874), for example, the defendant challenged his conviction for selling liquor, arguing that the prohibition on the sale of liquor violated the Fourteenth Amendment. The

[22]In his treatise on constitutional limitations, Thomas Cooley observed that no vested rights exist in the status quo:

> In organized society every man holds all he possesses, and looks forward to all he hopes for, through the aid and under the protection of the laws; but as changes of circumstances and of public opinion, as well as other reasons affecting the public policy, are all the while calling for changes in the laws, and as these changes must influence more or less the value and stability of private possessions, and strengthen or destroy well-founded hopes, and as the power to make very many of them could not be disputed without denying the right of the political community to prosper and advance, it is obvious that many rights, privileges, and exemptions which usually pertain to ownership under a particular state of the law, and many reasonable expectations, cannot be regarded as vested rights in any legal sense. (Footnotes omitted).

T. Cooley, *A Treatise on the Constitutional Limitations* 437 (1868).

[23]C. Warren, II *The Supreme Court in United States History* 572 (Rev. ed. 1947).

Court rejected the argument, but in so doing noted that, if the prohibition applied to liquor manufactured prior to the prohibition, then a serious issue would arise as to whether it deprives an owner of property without due process of law. 85 U.S. at 133. Concurring, Justice Bradley emphasized that compensation is required when vested rights are taken away for the public good, but that no such property interest existed in *Bartemeyer*.[24]

Similarly, in *Boston Beer Co. v. Massachusetts*, 97 U.S. 25 (1878), a company authorized to manufacture malt liquor argued that it had acquired such a vested right through its State incorporation, and therefore was free from the exercise of the State's police power. The Court held that liquor prohibition was an appropriate exercise of the police power, which the State cannot divest. 97 U.S. at 33. "If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the Legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer." *Id.* at 32. The Court added, however, that "[w]e do not mean to say that property actually in existence, and in which the right of the owner has become vested, may be taken for the public good without due compensation." *Id.*

Bartemeyer and *Boston Beer* both confirmed the principle that the police power could be constitutionally exercised to abate conduct and use of property that is noxious and harmful. The Court applied this same principle in *Northwestern Fertilizing Co. v. Hyde Park*, 97 U.S. 659 (1878), where the police power was exercised to abate a

[24]Justice Bradley explained that the law "was not in this case an invasion of property existing at the date of its passage, and the question of depriving a person of property without due process of law does not arise." 85 U.S. at 136. Justice Field also concurred, distinguishing *Bartemeyer* from the *Slaughter-House Cases*, where the Court upheld a State grant of a partial monopoly to one company in the slaughtering business, thus excluding others from engaging in the business. *Id.* at 137-38. Justice Field later wrote that the right to acquire, dispose of and use property is an inalienable right, but limited to the extent that such use "will not impair the equal enjoyment by others of their property." *Crowley v. Christensen*, 137 U.S. 86, 90 (1890) (upholding prohibition on the right to sell liquor).

nuisance that had been previously permitted. The State incorporated a fertilizing company to transport, manufacture and convert dead animals and animal matter into fertilizer. Subsequently, the company was given two years to stop transporting matter through Hyde Park. In an action brought against the corporation for refusing to stop its business, the company argued that its charter created a contract (or property) right that could not be impaired unless through condemnation. The Court rejected the company's argument, holding that the activity clearly involved a nuisance and that the police power "rests upon the fundamental principle that everyone shall so use his own as not to wrong and injure another. To regulate and abate nuisances is one of its ordinary functions." 97 U.S. at 667. And, since the government cannot contractually guarantee freedom from the exercise of the police power, the exercise in this instance was valid.[25]

None of these cases, however, held that the value of existing property could be totally destroyed without the payment of just compensation, nor did the "nuisance" cases relied on by the court below.

3. The Court in *Mugler v. Kansas* Did Not Create any Exception to the Just Compensation Requirement.

The court below emphasized *Mugler v. Kansas*, 123 U.S. 623 (1887). But that case was simply another example of the Court's evolving response to the parade of "due process" challenges to the exercise of the States' police power. Sellers and manufacturers of

[25]Subsequent cases upheld the *power* to prohibit or regulate one's ability to engage in activity or conduct deemed injurious to the health and safety of others. *See Pierce Oil Corp. v. City of Hope*, 248 U.S. 498 (1919) (storage of gasoline); *Reinman v. Little Rock*, 237 U.S. 171 (1915) (livery stables); *Gardner v. Michigan*, 199 U.S. 325 (1905) (garbage collection and disposal); *California Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905) (same); *Fischer v. St. Louis*, 194 U.S. 361 (1904) (upheld prohibition on dairy or cow stables to be built or maintained in city without permission); *New York & N. E. R. Co. v. Bristol*, 151 U.S. 556 (1894) (railroad crossing); *Patterson v. Kentucky*, 97 U.S. 501 (1879) (illuminating fluids).

alcoholic beverages challenged Kansas' law prohibiting the manufacture and sale of liquor.[26] The Court had to decide whether the State's police power could be constitutionally exercised in this fashion. Prior decisions had already established that the police power encompassed such regulation.[27] Yet, counsel for the liquor sellers argued, *inter alia*, that the prohibition was an unconstitutional attempt to deprive parties of their right to engage in the continued operation of the brewery. The State replied, *inter alia*, that parties acquire no vested right to engage in a particular business "detrimental to the public health or public morals, because of the absence of any legislation on the subject." *Mugler*, 31 L. Ed. at 207.

The Court held that the Fourteenth Amendment did not restrict the exercise of the State's police power to prohibit the manufacture and sale of liquor. The Court first reviewed prior decisions upholding the State's power to regulate the manufacture and local sale of liquor. It then rejected the argument that the police power could not regulate the right to manufacture liquor for one's own use, concluding that, as in the case of *Munn v. Illinois*, the power to regulate emanates from the power to protect society from the injurious consequences to others from the activity. The Court then explained that State legislatures have the power to determine what activity causes injurious consequences justifying the exercise of the police power, subject to the courts' constitutional responsibility to determine

[26]Kansas charged Mugler with manufacturing and selling liquor without a license in violation of the law, and Mugler challenged his conviction by claiming that he "was denied rights, privileges and immunities guaranteed by the constitution. . ." 123 U.S. at 653. In a separate action, Kansas sought to close down Ziebold & Hagelin's brewery. *Id.* at 654.

[27]*Foster v. Kansas*, 112 U.S. 205 (1884); *Boston Beer Co. v. Massachusetts*, 97 U.S. 25 (1878); *Bartemeyer v. Iowa*, 85 U.S. (18 Wall.) 129 (1874); *License Cases*, 46 U.S. (5 How.) 504 (1847), *overruled by Leisy v. Harden*, 135 U.S. 100 (1890).

whether it is a legitimate exercise of that power.[28] 123 U.S. at 660-62.

The *Mugler* Court, therefore, rejected the parties' specific argument that the prohibition must fail because they had a vested right to continue to engage in the manufacture and sale of liquor.[29] The Court held that the State had not, and could not contract away its police power, nor had it "give[n] any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged." 123 U.S. at 669. In accordance with prior decisions, the Court reaffirmed that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." *Id.* at 665.

The Court also refuted defendants' reliance on *Pumpelly v. Green Bay Co.* (discussed *supra*), emphasizing that *Mugler* did not involve the State's power of eminent domain; instead, "the question now before us arises under what are, strictly, the police powers of the State. . . [and] the present case must be governed by principles that do not involve the power of eminent domain." 123 U.S. 668. It ruled that a prohibition on use cannot be deemed a deprivation of property simply because it causes pecuniary loss "by reason of their not being

[28]"If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge. . . ." 123 U.S. at 661. Justice Harlan's majority opinion in *Mugler* echoed other opinions by Justice Harlan, in which the Court held that the exercise of the police power had to be reasonably related to a legitimate State objective. *See Hennington v. Georgia*, 163 U.S. 299 (1896); *Brimmer v. Rebman*, 138 U.S. 78 (1891); *Minnesota v. Barber*, 136 U.S. 313 (1890).

[29]The Court summarized the parties' argument as follows:

> it is contended that, as the primary and principal use of beer is as a beverage; as their respective breweries were erected when it was lawful to engage in the manufacture of beer for every purpose; as such establishments will become of no value as property, or, at least, will be materially diminished in value, if not employed in the manufacture of beer for every purpose,- the prohibition upon their being so employed is, in effect, a taking of property for public use without compensation, and depriving the citizen of his property without due process of law.

123 U.S. at 664.

permitted, by a noxious use of their property, to inflict injury upon the community." *Id.* at 669.[30] Lastly, the Court declined to construe the statute as necessarily authorizing the forfeiture of property lawfully in existence prior to the prohibition. *Id.* at 671-72. Thus, *Mugler* does not justify a public interest or nuisance exception permitting an uncompensated regulatory taking of existing property.

D. A Regulation That Destroys Vested Property Rights Requires Payment of Just Compensation.

In his oft-repeated observation that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking," Justice Holmes brought "due process" and "takings" analysis together. *Pennsylvania Coal Co. v Mahon*, 260 U.S. 393, 415 (1922). From that seminal decision evolved the contemporary concept of a regulatory taking. In *Pennsylvania Coal*, plaintiffs sought an injunction against the mining of coal underlying their property.[31] They alleged that the removal of coal would cause the subsidence of their house, contrary to the State law known as the Kohler Act. The trial court refused to issue an injunction, holding instead that the company had the right to remove the coal and that plaintiffs only sought to prevent a private injury. On appeal, the state supreme court held that the Kohler Act was a police measure which did not "contemplate the taking of private property for public use," and it upheld the Act. *Mahon v. Pennsylvania Coal Co.*, 118 A.2d 491 (1922).

This Court reversed. It held that, as applied to Pennsylvania Coal Company's property, the statute destroyed the company's existing contract and property rights. 260 U.S. at 413. The Court then balanced the extent of the taking, which it viewed as "great," against

[30]*See generally* E. Fruend, *Police Power, Public Policy and Constitutional Rights* 568-69 (1904) (explaining *Mugler* and the distinction between indirect pecuniary loss and taking, noting that State cannot compensate for pecuniary losses incurred as result of prohibiting a specific noxious use of property). Justice Harlan, writing the majority opinion in *Mugler*, later wrote in *Chicago B. & Q. R. Co. v. City of Chicago*, 166 U.S. at 235-6, that the "[d]ue protection of the rights of property has been regarded as a vital principle of republican institutions."

[31]Plaintiffs had previously conveyed the subsurface estate to the company.

the public interest, which it viewed as minimal and not involving a common nuisance. *Id.* at 413-14.[32] Thus, the Court concluded that "[i]f we were called upon to deal with the plaintiffs' position alone we should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights." *Id.* at 414.[33] In the remainder of the opinion, the Court held that, because the Act went too far and apparently did not secure any "average reciprocity of advantage" (*Id.* at 415),[34] it was an unconstitutional exercise of the police power. However, the Court indicated that the State's exercise of the police power, in these circumstances, would be constitutional if accompanied by just compensation.[35]

The principle of *Pennyslvania Coal v. Mahon* should have been applied by the South Carolina Supreme Court.

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[32]Justice Holmes had earlier indicated that the line between an acceptable police power measure and a taking was a matter of degree. *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908); *Rideout v. Knox*, 19 N.E. 390, 392 (Mass. 1889). *See also Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 367 (1922) (constant firing of ammunition over property may effect taking of easement).

[33]The Court distinguished *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531 (1914), where the Court had upheld a statute requiring the maintenance of pillars while mining to protect the safety of miners. The coal company had argued that the method for determining the appropriate width of the pillar violated due process. *Id.* at 540. A noted scholar has questioned whether this case even presented any serious issue warranting the Court's attention. A. Bickel, B. Schmidt, Jr., *IX History of the Supreme Court of the United States: The Judiciary and Responsible Government: 1910-1921* 306-07 (1984).

[34]A concept similar to "average reciprocity of advantage" had been used in earlier due process cases to justify the imposition of assessments on landowners for such public activities as draining swamps and building roads. *See, e.g., Davidson v. City of New Orleans*, 96 U.S. 97 (1878). Justice Holmes also used the phrase in *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 30 (1922).

[35]The opinion concludes with the caveat that "we assume that an exigency exists that would warrant the exercise of eminent domain." 260 U.S. at 416.

II. This Court Has Not Created Any Exception To The Just Compensation Requirement For Regulations That Destroy All Economic Value.

The South Carolina Supreme Court apparently assumed that *Mugler* and *Mahon* represented two distinct approaches to deciding whether there has been a taking of private property for which just compensation is due. The court premised its holding that Lucas was not entitled to compensation on its view that several of this Court's cases, beginning with *Mugler*, create a so-called "nuisance-like" exception to the right to just compensation for regulations that "go too far" under *Mahon*.

As shown above, however, the lower court's assumption misapprehends both *Mugler* and *Mahon*, as well as subsequent cases applying them. This Court's evolving response to challenges to the exercise of the State's police power demonstrates that *Mugler* does not support any modern day exception to the just compensation requirement. *Mugler* reflects the Court's recognition that States can regulate, and even prohibit, activity deemed injurious to the public health and safety. Such State action does not deny due process of law simply because it prevents persons from engaging in a particular activity deemed harmful to others. *Mahon*, on the other hand, establishes that a regulation that restricts the use of property to the extent of destroying its economic value is a taking.

Although this Court in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), acknowledged certain "nuisance" cases, it has never recognized a "nuisance" or "nuisance-like" exception which would mechanically justify a refusal to pay just compensation for the destruction of all economically viable uses of a property caused by an otherwise valid regulation. Instead, this Court's decisions have from the beginning been essentially "ad hoc" factually oriented inquiries. *Hodel v. Irving*, 480 U.S. 704, 714 (1987) (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979)); *see also Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224 (1986); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). Although these decisions are not necessarily reducible

to easy formulas, one statement about them can be made with confidence.

In every case, the Court has weighed not just the governmental or public interest in the regulation, but also the impact of the regulation on the property owner's interests. Nor should this be surprising, since the owner of private property is the intended beneficiary of the Just Compensation Clause. In no case has the Court rested on its analysis of the governmental action and declined to examine, as the court below did here, the property owner's rights.[36]

Indeed, the South Carolina Supreme Court's decision can be fairly read to create a *per se* rule never before applied in "takings" cases: if there is a valid public purpose to the regulatory measure, and if the legislature has taken the trouble to label the object of its regulation a "nuisance," then no compensation is payable even when the property owner's investment-backed expectations are totally frustrated by the loss of all economically viable uses of the property.

This novel interpretation "goes too far." It would change the Just Compensation Clause to read "nor shall private property be taken except for public use," thus eliminating any requirement for compensation. This Court's decisions have emphasized time and again that the question of whether a regulation effects a taking requires a factual inquiry into both the public justification and the impact on private property, one which "necessarily requires a weighing of private and public interests." *See, e.g., Keystone*, 480 U.S. at 492 (quoting *Agins v. Tiburon*, 447 U.S. 255, 260-61 (1980)). In none of the cases since *Mahon* has this Court held otherwise. Indeed, in two of the cases relied on by the lower court, there was no "just compensation" issue even presented or discussed.[37] Nor in the other cases did

[36]Even before the incorporation of the just compensation requirement into the due process clause and before *Mahon*, the Court in *Lawton v. Steele*, 152 U.S. 133 (1894) indicated that forefiture of articles declared to be illegal and a nuisance, such as illegal fishing nets or diseased cattle, might rise to the level of a due process violation if the property being taken was of great value.

[37]*Miller v. Schoene*, 276 U.S. 272 (1928); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

the Court's analysis *end* with the justification for the regulation; it never held that the regulation justified the uncompensated extinguishment of *all* economic value.

Hadacheck v. Sebastian, 239 U.S. 394 (1915), like *Mugler* before it, predates the Court's first acknowledgement in *Pennsylvania Coal Company v. Mahon* of the "regulatory takings" doctrine. *Hadacheck*, like *Mugler*, was merely a due process examination of the *validity* of the challenged regulation, and no more. *Hadacheck* involved a facial challenge to the regulation and there were no findings of fact on the extent to which the property owner's rights or "investment-backed expectations" were extinguished.

In *Hadacheck*, the owner had for many years conducted a perfectly legal brickyard business on a plot which overlay the clay deposits used in manufacturing the bricks. As the city of Los Angeles grew, it annexed the area in which the brickyard was located, which became primarily residential in character. The city then passed an ordinance prohibiting only the operation of the brickyard. The ordinance did not, for example, prohibit the extraction of the clay to be transported elsewhere, or any other business which might be conducted on the site.

The owner was convicted of the misdemeanor of continuing to operate the brickyard, and brought a habeas corpus petition alleging that the statute violated the Due Process Clause. No issue of whether just compensation should be paid was presented to or decided by the Court. Rather, the Court focused on the effect the ordinance had in depriving the owner of its ability to continue conducting the *business* of the brickyard -- just one of the many bundles of rights in the property. The lower court had stated that the regulation was not precluded by the fact that "the value of the investments made in the business ... will be greatly diminished." 239 U.S. at 408. This says nothing, nor would the record or posture of the case support anything further to be said, about the other uses to which the property could be put, or about whether and to what extent "just compensation" was owed to the owner.

Miller v. Schoene, 276 U.S. 272 (1928), decided after *Pennsylvania*

Coal Company v. Mahon, also presented only the question of whether the exercise of the police power was valid. That case similarly says nothing about whether just compensation was owed. In an effort to preserve the commercially valuable apple crop, the Virginia State Entomologist had directed that cedar trees near apple orchards be destroyed to eliminate the disease the cedar trees were suspected of transmitting. Certain cedar tree owners challenged the validity of the law.

It is noteworthy that the statute provided for payment to the owners for the costs of removal of the trees and also reserved to them ownership of the felled trees. Had a just compensation issue been presented by the case, the only property interest arguably taken would have been the interest present in the trees while they were standing. But that is beside the point; there was no question presented on whether the cedar tree ordinance went "too far" in any sense that would require the payment of just compensation. All that the Court was called upon to decide, and all that it did decide, was whether the statute was a valid exercise of the State's police power.

The facts of *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962), are somewhat similar to *Hadacheck*. The town of Hempstead had grown such that residential development and schools surrounded an extensive sand and gravel pit where prior excavations had created a twenty acre lake. What had once been a perfectly legal and unobjectionable activity now had become incompatible with its surroundings. The town enacted a regulatory ordinance which concededly rendered unprofitable the excavation activity, which was concededly the *most*, but far from the *only* profitable use of the property.

Here, the Court did consider the question of whether the regulation required the payment of just compensation, but little analysis was in fact required on the posture of the case. After noting that "[t]here is no set formula to determine where regulation ends and taking begins[,]. . ." *Goldblatt*, 369 U.S. at 594, the Court went on to say that "[h]ow far regulation may go before it becomes a taking we need not now decide, for there is no evidence in the present record which even remotely suggests that prohibition of further mining

will reduce the value of the lot in question." *Id.* In other words, the Court properly ruled that the issue of whether a compensable taking had occurred could *not* be decided without evidence and consideration of the private property owner's interest.

The final case relied upon by the lower court is the most recent, *Keystone Bituminous Coal Association v. DeBenedictis, supra*. This case is commonly misinterpreted as giving new life to the possibility of a "nuisance exception." *Keystone* does not, however, sanction the per se rule effectively adopted by the South Carolina Supreme Court in this case. The opinion of the Court in *Keystone* is in fact a classic "weighing of the public and private interests" so characteristic of this Court's takings jurisprudence.

In *Keystone*, Pennsylvania coal operators brought a facial challenge to the validity of a statute which required that certain coal deposits be left in place to prevent subsidence, or settling, of the surface due to mining. The Court's opinion sets out the task before the Court: "[t]he *two* factors that the Court considered relevant [in *Mahon*] have become integral parts of our takings analysis. We have held that land use regulation can effect a taking if it 'does not substantially advance legitimate state interests, ...*or* denies an owner economically viable use of his land.'" 480 U.S. at 485 (emphasis added). The opinion then states the essence of its holding: the application of *both* tests, not just one, demonstrates that the facial challenge must fail.

> First, unlike the Kohler Act, the character of the governmental action involved here leans heavily against finding a taking; the Commonwealth of Pennsylvania has acted to arrest what it perceives to be a significant threat to the common welfare. Second, there is no record in this case to support a finding similar to the one the Court made in *Pennsylvania Coal*, that the Subsidence Act makes it impossible for petitioners to profitably engage in their business, or that there has been undue interference with their investment-backed expectations.

Keystone, 480 U.S. at 485.

The Court first determined whether the statute served a legitimate public purpose. It described prior cases as expressing "[t]he Court's hesitance to find a taking when the State *merely* restrains uses of property that are tantamount to public nuisances. . . ." 480 U.S. at 491 (emphasis added). The Court said that its past "hesitance" to find a compensable taking when a State merely prohibits a nuisance was consistent with the notion of "average reciprocity of advantage" noted in *Pennsylvania Coal v. Mahon*. But this did not end the analysis. In a footnote to this discussion, the Court references the other rationale for the "hesitance," namely, the "simple theory" that since no individual has a right to use his property so as to create a nuisance or otherwise harm others, nothing is "taken" when the nuisance is enjoined. *Id.* at 491 n.20. The Court further indicates in this footnote that any "nuisance exception" to the takings guarantee is "not coterminous with the police power itself." *Id.* (quoting *Penn Central*, 438 U.S. at 145 (Rehnquist, J., dissenting)).[38] Moreover, during the same term, the Court decided two other cases clearly implying that both the element of the public purpose as well as the element of the impact on private property are, as stated in *Keystone, supra*, "integral parts of our takings analysis." *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). The Court's "hesitance" discussion, therefore, does not, as believed by the court below, dispense with any need to weigh the economic impact of the regulation on private property.

[38]In his dissenting opinion in *Keystone*, the Chief Justice elaborated on this language, stating among other things that the exception to the takings guarantee is in fact one based not on nuisance, but one premised on allowing the government to prevent a "'misuse or illegal use. . .'" and is a "narrow" one. *Keystone*, 480 U.S. at 512 (quoting *Penn Central* (Rehnquist, J., dissenting)). In effect, if there is an exception, it is certainly wrong to label it a "nuisance" exception, and it would appear to require considerably more illegality or harm than Lucas' proposed construction of two houses. The dissent further states that "we have not accepted the proposition that the State may completely extinguish a property interest or prohibit all use without providing compensation[,]. . ." a fair description of the effect of the Beachfront Management Act on Lucas' property here. *Id.* at 513.

The court below brushed aside this Court's ensuing consideration of the impact on the value of private property in *Keystone*, possibly because the Court concluded its public justification discussion by noting that it "need not rest. . . [its] decision on this factor [the public justification] alone. . . ." *Keystone*, 480 U.S. at 492. The South Carolina Supreme Court apparently read this phrase as a ruling that public justification can alone serve as the sole basis for denying just compensation. Two reasons, however, belie any such reading. First, the quoted language is prefaced by an express acknowledgement that any takings analysis "necessarily requires a weighing of private and public interests." *Id.* Second, it introduces an extensive discussion of how relatively little adverse impact the statute would in fact have on the coal operators' property rights. *Id.* at 493-99. That discussion concludes with an unqualified holding that "it is plain that the petitioners have not come close to satisfying their burden of proving that they have been denied the economically viable use of that property." *Id.* at 499.

Of course, if the Court had intended its *Keystone* opinion to signal that it would now recognize a rule not requiring compensation when the government legitimately acts to prevent a harmful use of property, no analysis of the impact on the property owner's rights would have been necessary. The Court's discussion of that impact was not, however, as the court below effectively held, mere dictum. The test for a regulatory taking includes the element of the impact on affected property as well as the public purpose. That is the consistent holding of this Court, *Nollan, supra; Agins, supra; Penn Central, supra*; and nothing in *Keystone* can be read as overriding this settled line of precedent.

CONCLUSION

The decision of the South Carolina Supreme Court should be reversed, and the case remanded for a consideration of Lucas' claim for just compensation.

Respectfully submitted,

Peter D. Dickson
Counsel of Record
Sam Kalen

Howard E. Shapiro
D. Eric Hultman
Richard A. Agnew
Van Ness, Feldman & Curtis
A Professional Corporation
1050 Thomas Jefferson St., N.W.
Seventh Floor
Washington, D.C. 20007
(202) 298-1800

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No. 91-453

In The

Supreme Court of the United States

October Term, 1991

DAVID H. LUCAS,

Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

On Writ Of Certiorari
To The South Carolina Supreme Court

BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR III*
CLINT BOLICK
JONATHAN W. EMORD
SCOTT G. BULLOCK
1001 Pennsylvania Avenue, N.W.
Suite 200 South
Washington, D.C. 20004
(202) 457-4240

RICHARD A. EPSTEIN
1111 East 60th Street
Chicago, IL 60637
(312) 702-9563

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS

This brief is submitted by the Institute for Justice as amicus curiae. We have secured the consent of both parties to the filing of this brief and letters of consent have been filed with the clerk. The Institute supports the position of the petitioner in this case and urges reversal of the decision of the South Carolina Supreme Court.

The Institute for Justice is a non-profit, public interest legal foundation litigating and educating in the areas of economic liberty, property rights, and the First Amendment. One of the pillars of the Institute's program is

securing full constitutional protection for private property rights threatened by government regulation.

The instant case could have a profound impact on the regulation of property throughout the country. Therefore, it directly implicates the Institute's mission. Furthermore, the Institute believes that the analysis of a noted authority on property and takings law contained in this brief will assist the Court in addressing the constitutional issues involved in the case.

CONDENSED STATEMENT OF FACTS AND SUMMARY OF PROCEEDINGS BELOW

The complete statement of facts and the history of this litigation have already been presented by both parties. This brief summary of them is designed to highlight those facts and legal determinations that we believe are critical to the proper understanding and disposition of the case.

The plaintiff, David H. Lucas, purchased two undeveloped waterfront lots, Numbers 22 and 24, in the Wild Dunes development on the Isle of the Palms in Charleston County, South Carolina in December, 1986, paying $455,000 for lot 22 and $500,000 for lot 24. Lucas borrowed $900,000 toward the purchase price from the North Carolina National Bank, secured by a mortgage on the two lots. At the time of the purchase both lots were zoned for single-family home development, and a similar home had at that time been built on lot 23, located between the two Lucas lots, and on other similar lots along the beach.

About eighteen months after purchase, Lucas' proposed development of the lots was thwarted by the Beachfront Management Act, S.C. Ann. § 49-39-10 et seq. (1988) (hereinafter BMA), passed by the South Carolina legislature on July 1, 1988 (Act 634), and administered by the state's Coastal Council. The BMA prohibited all new construction between the beach and certain setback lines. BMA § 280(A). The BMA also prohibited the reconstruction of existing houses that had been destroyed. One of the objects of the statute is to promote a "gradual retreat from the [coastal] system over a forty-year period." BMA § 280.

One immediate consequence of the BMA was to permanently deprive Lucas of the ability to use the property for its intended purpose, the construction of a single family home. South Carolina did not wrest from Lucas possession of the land; nor did it deprive him of the power to sell the land, subject of course to the restrictions imposed by the BMA. The statute also allowed Lucas to use his property for recreational purposes (picnics and outings), and to pitch tents or erect other temporary structures on the land. Trial Transcript (hereinafter Tr. Trans.) at 16-25; 91-98. The BMA did not, however, relieve Lucas of any potential liabilities of a landowner, or of the taxes he had to pay on the land. South Carolina claimed that Lucas' two lots retained some residual value because he was allowed to make some limited use of them under the BMA. Lucas testified that the lots had negative value because the value of the residual uses was lower than the cost of the liability insurance, and the real estate taxes remained unabated. Tr. Trans. at 31.

The trial judge found that the property had no market value after the imposition of the regulation, and that the regulation worked a "total taking of Lucas's two beach front lots." Order of Trial Judge at 130. He found Lucas is "entitled under both the State and Federal Constitutions to the payment of just compensation." *Id.* He further concluded that "since the State has totally acquired Lucas's property, it is entitled to a deed to the property free and clear of any encumbrances," a total condemnation of the property. *Id.* Accordingly, he ordered the state to pay: (1) compensation equal to the full market value of the lots without the restriction (which he found to be $585,000 per lot), (2) the real estate taxes paid on the property from the time the BMA went into effect, and (3) interest on the mortgage, for a total of $1,232,387.50, plus interest from the date of judgment. *Id.*

The South Carolina Supreme Court reversed the decision below and held that the regulations in question did not constitute a taking, even if they did wipe out the entire value of the property in question. *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 898 (S.C. 1991). In the view of the South Carolina Supreme Court, the regulation in question was, as the plaintiff admitted below, a valid exercise of the police power. The Court therefore allowed the state to impose the regulation without compensation. In its view Lucas made a fatal concession by acknowledging that the BMA "is properly designed to preserve the extremely valuable resource which is South Carolina's beaches." *Id.* at 896. From this, the South Carolina Supreme Court held that Lucas conceded "the validity of the legislative declaration of its 'findings' and 'policy,' " *id.* at 896, and conceded that "discouraging

new construction in close proximity to the beach/dune area is necessary to prevent great public harm." *Id.* at 898. The Court deemed itself "bound by these uncontested legislative findings." *Id.* It then rejected Lucas' contention that so long as the landowner has been deprived of " 'all economically viable use' of his property, it has worked a 'taking' for which compensation is due, regardless of any other consideration." *Id.*

In a strong dissenting opinion, Judge Harwell refused to accept the proposition that South Carolina could regulate property to "oblivion" and found that while the taking was permissible for a public purpose, it was not designed to prevent any nuisance or noxious activities on the plaintiff's land, and that therefore compensation was required. *Id.* at 906.

SUMMARY OF ARGUMENT

Amicus curiae urges this Court to reverse the decision of the South Carolina Supreme Court and to restore the condemnation award made by the trial judge below. In our view, the case should be understood as a standard takings case in which the state has deprived its owner of one of the indispensable attributes of ownership, the ordinary use of the property so owned. In reaching this conclusion, ownership should not be understood simply as the bare possession of a physical object, but as a set of complete and well defined rights over the property. As repeated decisions of this Court have recognized, ownership includes the right to possession, use, and disposition of the property in question, and that takings can occur

even when the original owner of the property has been left, as here, in undisturbed possession of the land whose use has been regulated.

The massive restrictions on use in this case thus amount to a *prima facie* taking, which the state has to justify *or* provide compensation. In dealing with this question of justification, it is critical to distinguish, as the South Carolina Supreme Court did not, between two separate questions of takings jurisprudence: (1) whether the taking was for public use, and (2) whether the taking was justified under the police power. The radically different nature of these two inquiries is well revealed by the consequences that are attached to each. If the state cannot show that a taking is for public use, then it cannot proceed by the eminent domain power, but must (unless its actions be *ultra vires*) proceed by voluntary purchase. But if the public use requirement alone is satisfied, the taking can only go forward if just compensation is paid.

The police power functions in a wholly separate fashion – as a justification for taking the property, or for restricting its use *without* compensation – and can be established only by meeting requirements more stringent than those necessary to establish a public use, namely that the landowner's intended use of the property has caused, or threatens to cause, a nuisance (public or private) which is appropriately neutralized by the land use restriction. Any broader conception of the police power allows the state, as agent of its citizens, to take without compensation property that the citizens themselves would have to purchase from the landowner.

The decision of the South Carolina Supreme Court is fatally flawed because, far from observing the structural distinction between public use and police power, the Court treated the two different conceptions as identical. South Carolina has advanced a large number of justifications for its stringent restriction on land use; some of these go to the protection of the beach against erosion, BMA § 250 (2)-(6). These provisions prevent potential nuisances which, in principle, South Carolina should be able to prevent without the payment of compensation. Yet other justifications in the BMA, such as the promotion of tourism, and for the leisure of South Carolina citizens, BMA § 250(1)(b),(d), only identify public uses for which Lucas' land may be taken with just compensation. Lucas conceded below that the BMA amounted to a "laudable goal." *Lucas*, 404 S.E.2d at 896. The court erred by interpreting this statement to be a concession that his planned beachfront home should be treated as a nuisance or other noxious activity that South Carolina may restrain without compensation. This error arose from the court's failure to make the proper terminological distinctions.

Once the relevant distinctions become clear, the decision of the South Carolina Supreme Court should be reversed, but on a theory that is different from that on which the plaintiff requests relief. In his petition for certiorari, the plaintiff inexplicably disclaims the theory on which the trial judge entered a decision in his favor by insisting: "This petition does not concern the exercise of eminent domain. Petitioner concedes that no permanent physical occupation occurred here." Petition for Certiorari at 5. The absence of the physical occupation only shows that the case raises the issue of a regulatory, or

partial taking, not that takings issues are absent. The massive restriction on land use, whether or not total, amounts to a taking of the property for which compensation is required in the absence of justification. South Carolina here has not offered *any* justification to show how the elimination of the construction on this property advances its legitimate end of controlling the erosion of the beachfront, which rests in public hands. South Carolina has been prepared to appropriate $10,000,000 to the maintenance of the public beaches. Tr. Trans. at 69. If it wishes to expand the area of undeveloped land, it is free to do so, as long as it pays the owner the market value of the property. It is not sufficient to allow South Carolina to regulate because it wants to do so. "[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal v. Mahon Co.*, 260 U.S. 393, 416 (1922) (per Holmes, J.), quoted by the dissent in *Lucas*, 404 S.E.2d, at 903.

ARGUMENT

I. ANY RESTRICTION ON THE ORDINARY USE OF PROPERTY IMPOSED BY THE STATE IS A PARTIAL REGULATORY TAKING FOR WHICH COMPENSATION IS REQUIRED UNLESS A POLICE POWER JUSTIFICATION IS ESTABLISHED.

It is well recognized that property constitutes more than permanent physical objects that are the subject of external sensation. Instead private property refers to the complex of rights over a particular thing that the owner of that property enjoys against the entire world. The

ordinary conception of property thus embraces far more than the right to naked possession of real property, and the associated right to exclude all other persons. It embraces the right to make ordinary use of the property in question, and to dispose of it by sale, lease, mortgage or other forms of voluntary exchange. Definitions of this sort have been recognized from every source. The standard dictionary definitions all embrace the three elements of possession, use, and disposition;[1] the definition is part and parcel of the accounts of property that are used by common lawyers[2] and political philosophers[3] and, most critical in the evaluation of takings cases, under the takings clause itself. Thus this Court has written in *United States v. General Motors* as follows:

> The critical terms [of the takings clause] are "property," "taken" and "just compensation." It is conceivable that the first was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by the law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point

[1] "Property: 2. Ownership or dominion; the legal right to the possession, use, enjoyment and disposal of a thing; a valuable legal right or interest in or to particular things." Funk & Wagnalls, *New Comprehensive International Dictionary of the English Language* 1011 (1982).

[2] *See* A.M. Honore, "Ownership," in *Oxford Essays in Jurisprudence* 107 (1961).

[3] *See* J. Tully, *A Discourse on Property: John Locke and His Adversaries* (1980).

of fact, the construction given the phrase has been the latter.[4]

Under this definition it is clear that there cannot be a watertight line drawn between those actions of the state that allow it to enter into possession, and those which regulate the way in which it is used by its private owner. The imposition of any restriction upon use, above and beyond those inherent in the law of nuisance, can ordinarily be done by private parties only if they purchase a restrictive covenant over the land in question. There is no reason in law or principle why the same individuals who in their private capacity are required to purchase this interest in land are in their public capacity allowed to take it by majority vote *for nothing*. The restrictions imposed upon Lucas' use of land under the BMA should be understood as a covenant in gross (that is, a covenant unattached to any dominant tenement) that is held by the public at large. It is quite sufficient for the protection of all public interests to allow the state to do what no private owner could do: compel the surrender of the covenant against the will of the person who owns the land. It is wholly unnecessary, and ultimately mischievous, to give any state the additional power to compel the surrender of the covenant without payment of any compensation for the loss in value, great or small, that is brought about by the restriction in question.

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[4] *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945). South Carolina law contains an identical account of ownership. *See Gasque v. The Town of Conway*, 194 S.C. 15, 8 S.E.2d 871 (1940).

In his arguments throughout the case, Lucas has avoided one implicit consequence of this argument. Lucas takes the position that the regulation automatically requires full compensation where the restriction on use results in a total loss of value, but acknowledges that South Carolina is free to impose substantial restrictions on use where there is some residual use in question. In essence, Lucas has sought to develop a *per se* rule that deals with a wipe-out case but does not extend his theory to any case of partial restrictions. This approach is conceptually inadequate because it creates a gratuitous and unprincipled conceptual gulf between total restriction on use and massive partial restrictions.

The potential danger of Lucas' position is further revealed by a close examination of the underlying facts of the instant case. South Carolina introduced evidence that the value of the property was positive because the plaintiff, in addition to retaining the rights of possession and disposition, also retained the rights to use the land for recreation and for temporary structures. Tr. Trans. 56. The trial judge rejected that evidence because he believed that the market value of the property in question was zero. But suppose he believed that the value of these residual uses increased the value of the land to $9,000 or one percent of its original cost, and a slightly smaller fraction of its present market value. Suppose also that the trial judge found that the residual tort liability and real estate taxes were tantamount to a lien of $8,000 on the land, leaving the property with a net valuation of $1,000. Under these circumstances, the proper approach is to hold that the plaintiff is entitled to the market value of

the property[5] *less* the residual value of the property in private use.[6]

Under the plaintiff's faulty approach, the restriction on use would not, or at least might not, amount to a taking. In such a case, compensation, if owed at all, would be payable under some fluid and unprincipled balancing test. Yet if the value of the accumulated liens were $10,000 (and thus exceeded the residual value in use), the plaintiff would be entitled to full compensation of the property in question. A shift of $2,000 in the relative value of the residual uses and the ongoing tax and tort liabilities should alter the level of compensation only by the same $2,000. It should not precipitate a huge

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[5] The reference to the market value reflects the current state of the Supreme Court law, *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893) (compensation only for the market value of the property taken); *United States v. Bodcaw Co.*, 440 U.S. 202 (1979), and ignores the important issue of compensation for the loss of subjective value in excess of market value.

[6] Note that if the state leaves the individual owner with net liabilities, then it should pay compensation in excess of the fair market value. The right formula in all cases is the fair market value of the property taken, less value of property retained. If the value of the property equals zero, then the compensation is equal to its market value. But if the value of the property is negative, then the compensation owed equals the market value of the property taken *plus* the residual liabilities retained by the landowner. In the case at hand the trial judge avoided these valuation difficulties by ordering Lucas to deliver deed of title to South Carolina, thereby wiping out any residual liabilities. For the weaknesses of his approach, see Section V, *infra*.

swing in the recoverability of millions of dollars in compensation.

The proper rule is thus one of strict proportion: the greater the taking, the greater the restriction, then the greater the compensation that must be paid. The just compensation clause should induce the state to act responsibly in dealing with its citizens. It should not spur irresponsible brinkmanship by public officials, whereby small differences in valuation generate enormous differences in outcome.

II. THE MARKET VALUE OF THE PROPERTY IN QUESTION AFFORDS THE PROPER MEASURE OF COMPENSATION FOR THE LOSS IN QUESTION.

In the course of its argument at trial, the Coastal Council adopted an alternative approach which is likely to be repeated on appeal. It urged that the property in question was subject to a serious erosion risk, and in fact had been underwater for a substantial period of time during the past 40 years. Tr. Trans. at 36-39. Its argument in effect, although not reached by the South Carolina Supreme Court, was that, even if the total restriction on use amounted to a taking, no compensation was owed because the property was valueless for its intended use. No prudent person would build in light of the unstable conditions on the South Carolina coast.

The chief mistake in this argument is that it eliminates the market value test of eminent domain and substitutes a bureaucratic determination of value that reflects the self-serving desire of public officials to create the

impression that environmental regulation causes no serious private harm. But the Coastal Council's argument overlooks the fact that the dangers to Lucas' plot were evident to all persons who bought and sold property on the island (Lucas himself was a native islander and a real estate broker who had bought and sold between 1000 and 1500 properties on the island since he arrived on Palm Island in 1978-1979. Tr. Trans. at 32-35). The erosion and hurricane risks were well known to all persons who lived on the island.

The market valuations reflected the erosion risk. If that risk were zero, then the value of the property would doubtless have been far higher than it was. Indeed some portion of the high appreciation – by one estimate, at 56 percent per annum average over a 7 year period between 1979-1986, Tr. Trans. at 44-45 – was attributable to the perception that the island was "accreting" so that the risk of destruction by hurricane or weather was reduced as the size of the island expanded. Indeed, at trial the beach was a "football field away from the property line," which might be regarded as "ocean view" and perhaps not as "ocean front" property. Tr. Trans. 36, 38.

Just because members of the Coastal Commission would not invest their own money on the island does not mean that other people are foolish or imprudent to do so. The market allocates resources to those persons who value a given asset the most, not those who value it least. That true market value, and not the arbitrary value assigned to it by government bureaucrats, is the proper measure of compensation.

III. THE SOUTH CAROLINA SUPREME COURT DID NOT RECOGNIZE THE DISTINCTION BETWEEN THE PUBLIC USE AND POLICE POWER REQUIREMENTS UNDER THE JUST COMPENSATION CLAUSE.

A. The South Carolina Supreme Court mistakenly used the generous standards of the public use requirement to bypass the more stringent standards under the police power.

The text of the just compensation clause contains an explicit reference to the public use requirement, but no reference at all to the police power. The cardinal mistake made by South Carolina has been to analyze the case as though there were no distinction between the public use and the police power requirements under the clause. Yet it is imperative to make some distinction between the two. Thus suppose that South Carolina chooses to condemn the Lucas' property, and then to resell it at the same cost to Lucas' neighbor on plot 23. The police power justification is negated by the payment of compensation, so that the only unresolved issue is whether the taking for resale is a taking for a public use under the rules developed in *Berman v. Parker*, 348 U.S. 26 (1954) and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).

Even if this broad account of public use correctly identifies the occasions where state coercive power may be directed against individual citizens, it surely says nothing about whether compensation is owing when the state seeks to take or to regulate. When the state takes land for use as a highway or a post office, the presence of an unquestionable public use does not excuse it from its duty to pay compensation to the landowner. Or suppose,

as was the case in the nineteenth century, that the state wishes to authorize a private party to flood the land of a neighbor in order to form a reservoir sufficient to operate a mill. *See Head v. Amoskeag Mfg. Co.*, 113 U.S. 9 (1885). Even though this Court held this taking was for a public purpose, the private party responsible for the flooding had to pay for the damage caused on land that was not occupied. Compensation and public use are determined by radically different tests.

The test for a public use today is any form of public benefit from the government action undertaken. But what about the police power? Here the traditional conception of the police power was tied to the commission of a common law nuisance, a point conceded by the South Carolina Supreme Court in *Lucas* itself. *Lucas*, 404 S.E.2d at 899. It might seem odd at first blush that the limits of state power to regulate could be determined, even in part, by the common law conceptions of nuisance that have been developed over the centuries in such radically different contexts. But the intimate historical connection between the law of nuisance and the proper scope of the police power remains in principle as vital and important today as it has ever been. In the private context, the defendant who creates a nuisance can be shut down without compensation, and without the need to purchase a restrictive covenant. Instead the owner of the private property must purchase the easement to cause damages. Nuisance law thus determines when one neighbor must compensate another for the restrictions imposed on the use of property. That is precisely the same question that is

asked when "the community" (a group of many neighbors) seeks to impose restrictions on some of its members.

The tests to determine what constitutes a nuisance at common law are often complex. *See Restatement (Second) of Torts* § 825ff. Thus normally a physical invasion is required, be it of smells, fluids, dust, gasses and the like. *See, e.g., Bamford v. Turnley*, 3 B & S. 67, 83, 122 Eng. Rep. 27, 32-3 (Ex. 1862) (Bramwell, B.). Yet in some instances low level nuisances are not regarded as actionable under the "live and let live" rule. In other circumstances, non-invasive conduct is regarded as a nuisance, as with the obligations of lateral support. See, *e.g., Corporation of Birmingham v. Allen*, L.R. 6 Ch. D. 284 (C.A. 1877) for an exceptionally clear statement of the relevant rules. In each of these cases the objective of the law is to resolve conflicts in ways that maximize the joint value of all resources owned by the parties to the dispute. And the rules of common law nuisance do that better than any alternative set of rules. Would neighboring landowners really prefer to be in an initial position in which *none* could develop property without the consent of all neighbors? Would they prefer to be in a position in which all are required to pay compensation for the trivial and repetitive nuisances that each inflicts on the other? Would they prefer to allow each to dig to the boundary of the land even though the land, natural growth, and houses on the adjacent plot may be damaged? In each case the set of mutual restrictions works to the benefit of both parties subject to the regulation.

When these rules are carried over to the law of eminent domain, their force cannot be gutted simply by a

legislative determination that certain conduct is a nuisance, without any proof thereof. The entire structure of the just compensation clause would be frittered away if the state could take what it pleases when it pleases simply by declaring the prohibited use a "nuisance." This Court has never tolerated so casual and slippery a conception of nuisance in the first amendment area. Unsupported legislative declarations that certain forms of conduct are a nuisance are without constitutional weight. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975). The state must show, in accordance with traditional common law rules, that the noise and inconveniences caused by certain activities do rise to the level of common law public nuisance. *See Kovacs v. Cooper*, 336 U.S. 77 (1949). Certainly the legislature could not get around the prohibitions against taking by declaring X to be Y's debtor, and then allowing Y to collect the sum in question by an ordinary common law action. At every point the manipulation of common law categories must meet the tests of judicial scrutiny.

The legislature cannot evade its constitutional obligations by resorting to creative redefinitions. This single, but vital limitation on legislative power explains why the common law nuisance is an indispensable ingredient of the law of takings. The great difficulties with takings arise when individuals abandon the private remedies that they have against their neighbor and seek to obtain redress through the political process. In any constitutional system, the critical element is to make sure that political opportunism is not the reason for the resort to the political process. Thus if A and B by agreement between themselves could not condemn the property of C

for their own use, then what additional powers should they obtain by appealing (in a three person society) to a 2 to 1 vote in the political arena? The use of the nuisance requirement means that the majority of two cannot convert a private loss into a public victory. It prevents, therefore, an illicit shift to the public sector that might overwhelm the system of property rights that establishes the relation of person to person.

But it may be protested that ours is not a society of small numbers but of millions. And so it is. Yet it is precisely for that reason that there is greater necessity today to enforce the limitations that the just compensation clause imposes on the political process. The basic inquiry has two parts. First, there is the question of why political majorities should be able to condemn *with compensation*. When we deal not with a majority of 2, but of 2,000 or 2,000,000 persons, it is not possible for them by unanimous voluntary agreement to coordinate their efforts to purchase needed property from the class of persons in the position of C. The temptation of individual citizens to free ride on their neighbors is too great.[7] Eminent domain allows the state to use its power of taxation and deliberation to organize the coalition that purchases property with tax revenues. Yet at the same time the just compensation clause prevents politics from allowing an end run around the compensation requirements normally applicable in private disputes. That additional restriction on government should not be imposed where the private parties can on their own initiative

[7] *See* Cohen, *Holdouts and Free Riders*, 20 J. Legal Studies 351 (1991); M. Olson, *The Logic of Collective Action* (1965).

restrict land use without compensation. But it is required where private actors could not restrict as of right. The nuisance law determines that boundary in the private sphere, and to maintain the parity between the two systems, it must do so in the public sphere as well. A group that is not prepared to pay $1,000 to purchase a restrictive covenant should not be allowed to get that self-same interest by spending $500 in the political arena.

Private parties cannot restrict ordinary activities of landowners without compensating them; the state under the takings clause is subject to that same restriction. Private parties can enjoin a nuisance without compensation; the state as their representative has the same power.[8] Quite simply, no other test is available to determine when state action requires compensation and when it does not, as this Court itself has acknowledged. *See Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). Indeed, any test, however delicately phrased, which seeks to answer the police power question by asking whether the restriction in question serves some legitimate state interest collapses the fundamental distinction between public use and police power that organizes this entire branch of law.

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[8] For one illustration of the point, see *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), where the Court allowed the state to enjoin the operation of a brickyard even though the neighbors came to the nuisance only after its operation was established. That is the identical result reached in the coming to the nuisance cases in the private law, where the injunction is similarly allowed. *See, e.g., Sturges v. Bridgman*, 11 Ch. D 852 (1878); *Ensign v. Walls*, 323 Mich. 49, 34 N.W.2d 549 (1948); *Restatement (Second) of Torts*, § 840 C, D.

B. The anti-nuisance approach to the police power allows for a coherent analysis of the BMA that supports the anti-erosion provisions of the statute but invalidates the building prohibition.

The power of this general approach is revealed by a closer analysis of the BMA. First, the BMA prevents any landowner along the beach from "armoring" the beachfront property. BMA § 250(5). That restriction should be sustained, and indeed is not challenged here. The normal ebb and flow of the tides are allowed to do their work. The beach will sometimes expand, at other times it will contract. But the construction of massive bulwarks on the beach will starve it of new sand and cause material physical damages to the beach and its long term health. In this limited respect, therefore, the BMA enjoins a nuisance that private landowners could commit against their neighbors, and, more importantly, against the public at large.[9] The prohibition of this kind of activity is appropriate by a simple test: the state is allowed to enjoin the activities that, should they result in harm, would entitle it

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[9] It is this test which explains the weakness of this Court's decision in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1985). There the Court did not recognize that the police power limitation, associated as it is with the law of nuisance, protects only *strangers* to the transaction. Since the landowners in *Keystone* sought to recover the support easement that they conveyed away, they should have been required to pay compensation to repurchase the same interest that they released. If private parties are not bound by their own consent, then the system of private property is always subject to destruction at the whim of the state.

to compensation as owner of the beach after the harm is done.

South Carolina in this case wishes to go further, and to prevent the construction of any ordinary single family dwelling on the property in question. But although the South Carolina Supreme Court speaks of the object of the statute as the prevention of "serious public harm," *Lucas*, 404 S.E.2d, at 898, the phrase is simply conclusory. The total ban on real estate development cannot be sustained by the arguments that justify the anti-armoring provisions. There is no showing that the construction of a house on a beachfront lot will increase the level of erosion of the beach, or that it will effect the stability of the land on which neighbors have constructed their own houses. At most South Carolina shows that it wants to restrain the construction on that property very much. The test that allows compensation above fails here, for if this were a private beach, its landowner could not stop construction unrelated to the erosion risk.

South Carolina's own stated purposes are vintage public use arguments, wholly irrelevant to the more difficult task of regulation *without* compensation. Thus if the state wished to take land for a highway on the ground that it would benefit tourism and the leisure of its own citizenry, certainly it would have to pay compensation. If it wanted to take the soil from an adjacent landowner to nourish the beach for the benefit of tourism and the leisure of its own citizenry, it would still have to pay compensation. If it wants to obtain a restrictive covenant over private land for the benefit of tourism and its own citizenry it again has to pay. There is no enormous gulf between the justifications that are required of the state

when it occupies property and that are required of it when it restricts, in whole or in part, the use of that property by a private landowner. Tourism and local leisure, which fail in the former case, also fail in the latter.

The arguments just advanced differ in important ways from those put forward by Lucas. Lucas argues that as long as the taking is total, the question of justification need not be considered at all. Yet no balanced theory of takings could be that protective of private property against the legitimate claims of the state. If the sole use of the landowner's property is as a brickyard, as was the case in *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), it seems odd to say that the question of whether the state must compensate in order to enjoin a nuisance depends on whether the landowner can salvage some small value from the alternative use of his own land. As long as there is no overbreadth in the regulation, as long as some less restrictive alternative is not available to the state, then the total wipe-out is fully justified *but only in a nuisance case*, just as if the private neighbors had been able to obtain an ordinary injunction to the same effect, without the payment of compensation.

The proper analysis of the justification question thus mirrors that of the initial takings question. There is no magic in a total (as opposed to a partial) restriction on use; if the anti-nuisance justification supports the injunction, then so be it. If it does not, then the state must pay for what it takes. The reason why Lucas is entitled to the compensation awarded by the trial judge is simple. The state did not remotely offer any anti-nuisance justification for prohibiting the construction of the ordinary single family home.

IV. THE REQUIREMENT THAT SOUTH CAROLINA PAY JUST COMPENSATION IN THIS CASE FURTHERS AND DOES NOT RETARD INSTITUTIONS OF SOUND GOVERNANCE.

The restoration of the trial court's award of full compensation to Lucas will continue the reversal in the law of takings that was begun in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). Yet there is every reason to welcome the shift, not because it protects the provincial interests of property owners against the welfare of the public at large, but because the protection of property against depredations from the state is the surest way to advance the general public welfare.

In order to see why, it is important to remember a truth that has been evident from Blackstone's day, namely, "the public good is in nothing more essentially interested, than in the protection of every individual's private rights . . . " 1 W. Blackstone, *Commentaries* 139 (1765). Within that calculus the welfare of *all* citizens of the state has to be taken into account, not merely of those who benefit from the restriction. Whether the land use restrictions of South Carolina wipe out Mr. Lucas and people similarly situated, or cause them substantial financial loss, or merely cause them smaller inconvenience, those losses, great or small, count as much in the social calculus as the gain to any other person. That each person counts for one and only one is a cardinal principle of political philosophy and constitutional interpretation, and the claims of landowners cannot simply be brushed

aside in some headlong rush to satisfy majority will no matter how worthy the cause.

But how are these interests to be taken into account? In effect, South Carolina claims that it has considered all the interests, public and private, when it has passed legislation, and that deference is afforded its considered judgment. But if Lucas is in the minority, what guarantee is there that the majority has considered his interest on a par with its own? And what possibility does this Court have of superintending the legislative process to determine whether his interest has been given its full deserved weight in the social process? The very reason why we have a constitution, why we have a takings clause, is because we know from history that legislative majorities, unless constrained by judicial power, can and will misbehave by favoring those who have political power over those who do not. This Court cannot be a constant council of revision to pass on the soundness of each and every piece of legislation by examining it afresh on its merits. But where property has been taken for public use, it can require that the state pay full compensation so that it is assured that individual interests sacrificed receive their full measure of protection.

Over and over again this Court has recognized that where statutes disproportionately affect on a select group, they are constitutionally suspect because they require private parties to bear in full the costs that should in justice be borne by society as a whole. *See, e.g., United States v. Armstrong*, 364 U.S. 40, 49 (1960). The concern here is not only with equity, but also with the preservation of the overall productive capacities of society as a

whole. If the South Carolina legislature need not compensate Lucas and others similarly situated for their losses, then it will ignore these costs in making the social calculus. The implicit subsidy that this Court will confer on state legislatures will have the same deleterious social consequences in this context that other subsidies have in other contexts. It will lead to excessive levels of the subsidized activity, in this instance too much government, for too little gain. The functional purpose of the takings clause is to eliminate any potential divergence between private and social costs, to knock out the subsidy that induces the state to undertake projects that impoverish the citizenry as a whole while benefitting some select fraction of it.

No one, least of all Lucas who lives along the beach and understands its fragile nature, disputes that there should be public expenditures for the maintenance of valuable and irreplaceable resources that are now in public hands. Indeed South Carolina has already appropriated by general bond issue $10,000,000 for the maintenance and nourishment of the beach. Yet there is no reason to believe that the draconian sanctions at work on Lucas provide a public benefit remotely equivalent in value to the loss that it causes. All environmental causes are not of equal importance and of equal dignity. The one way South Carolina could prove the importance that it attaches to adding a restrictive covenant over the Lucas land to its chain of beachfront properties is to pay for it. That is what this Court should do by reversing the order of the South Carolina Supreme Court and restoring the judgment of the trial court below.

V. THE REMEDY AWARDED BY THE DISTRICT COURT IS INCORRECT BECAUSE IT DENIES THE STATE THE OPTION OF REPEALING THE RESTRICTIONS IN QUESTION UPON PAYMENT OF INTERIM DAMAGES UNDER THE *FIRST ENGLISH* OPTION.

At the conclusion of the hearing, the trial judge, having properly adjudged that the BMA worked a taking of Lucas' property, ordered the state to pay full compensation in exchange for a fee interest in the property. This rule is in error because it forces South Carolina to make enormous expenditures for interests in real property which it may not wish to acquire once its constitutional obligations are clear. Nor should this Court believe that once it declares the restrictions in issue a taking that South Carolina is committed to acquiring title to all of the unbuilt coast. Quite the contrary, once it has become clear that South Carolina has taken Lucas' property, it should be left the option to return it to him, paying him only the damages for the *interim* taking under the *First English* doctrine. At that point the state can reconsider whether it wishes to go through with the taking contemplated under the original BMA once its obligation to compensate has been established. The solution proposed here surely benefits both parties, for Lucas now enjoys the return of his land, while South Carolina regains control over its budget.

VI. CONCLUSION

The judgment of the South Carolina Supreme Court should be reversed. Judgment should be entered that the BMA works a taking of Lucas' land, and the state should have the option of either keeping the land and paying full market value, or of removing the regulation and compensating Lucas for his loss of interim use.

Respectfully submitted,

INSTITUTE FOR JUSTICE
WILLIAM H. MELLOR III*
CLINT BOLICK
JONATHAN W. EMORD
SCOTT G. BULLOCK
1001 Pennsylvania Avenue, N.W.
Suite 200 South
Washington, D.C. 20004
(202) 457-4240

*Counsel of Record

RICHARD A. EPSTEIN
1111 East 60th Street
Chicago, IL 60637
(312) 702-9563

Counsel for Amicus Curiae Institute for Justice

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

DAVID H. LUCAS,
Petitioner,
v.
SOUTH CAROLINA COASTAL COUNCIL,
Respondent.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF OF AMICI CURIAE THE AMERICAN MINING CONGRESS, THE NATIONAL COAL ASSOCIATION, THE NATIONAL FOREST PRODUCTS ASSOCIATION, THE AMERICAN FOREST COUNCIL, AND THE AMERICAN FOREST RESOURCE ALLIANCE IN SUPPORT OF PETITIONER

Of Counsel:
EDWARD M. GREEN
General Counsel and Secretary
STUART A. SANDERSON
Senior Counsel
AMERICAN MINING CONGRESS
1920 N Street, N.W.
Washington, D.C. 20036

WILLIAM E. HYNAN
Senior Vice President
NATIONAL COAL ASSOCIATION
1130 17th Street, N.W.
Washington, D.C. 20036

ROBERT A. KIRSHNER
General Counsel
NATIONAL FOREST PRODUCTS ASSOCIATION
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

WILLIAM R. MURRAY
Counsel
AMERICAN FOREST RESOURCE ALLIANCE
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

GEORGE W. MILLER *
WALTER A. SMITH, JR.
JONATHAN S. FRANKLIN
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-6575
Counsel for Amici Curiae

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a State may avoid compensating a party for the complete destruction of his settled property rights, on the theory that the Just Compensation Clause contains a "nuisance exception."

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INTERESTS OF THE AMICI CURIAE

The five Amici represented here constitute a broad cross-section of firms that draw on the Nation's natural resources to benefit the American people and the economy. Thus, the National Coal Association is a non-profit trade association representing coal mining companies that own or operate more than 70 percent of the Nation's coal producing capacity. Its members also include other key segments of the industry—coal sellers, equipment suppliers, resource developers, transporters, electric utilities and con-

sultants. The American Mining Congress is a non-profit association comprised of mining companies that produce most of the Nation's minerals, as well as manufacturers of mining equipment, and engineering, financial, and consulting firms serving the mining industry. The National Forest Products Association and the American Forest Council are non-profit organizations whose members account for much of the timber managed and harvested in this country, as well as most of the solid wood products manufactured. Finally, the American Forest Resource Alliance is a coalition of community, labor, housing, industry and other groups with an interest in the timber industry.

Coal is used to generate more than one-half of the electricity consumed on an annual basis in the United States. The mining industry not only produces the vital resources needed to manufacture virtually all commodities sold in domestic and foreign markets, it also provides jobs essential to the Nation's economic health. Mine workers are the highest paid industrial workers in the United States. Similarly, the solid wood and pulp and paper industries supply raw materials that are essential, among other things, to written communication and to the Nation's ability to supply affordable housing for its people. Those industries contribute approximately four percent of total Gross Domestic Product, providing an important source of employment and in some cases the economic foundation of rural communities.

The major purpose of all Amici is to represent those with interests in the Nation's natural resources industries and to work with public officials in formulating public policy affecting those industries. Amici seek to develop policies that will result in the efficient utilization and conservation of natural resources consistent with economic, environmental, safety and other goals.

Because of their stated interests, the present case is of great importance to Amici. This is so for several

reasons. First, as this Court's previous cases have demonstrated, the scope of the Just Compensation Clause of the Fifth Amendment necessarily has a significant impact on the Nation's natural resources industries. *See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1 (1984); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531 (1914). Second, unlike most other commercial activities, the economic viability of these industries depends almost entirely on a vast resource that is subject to continual government regulation. For example, the collective worth of the Nation's private timber reserves is over $400,000,000,000. Accordingly, the extent to which the States may prevent the use of a resource of this magnitude—and do so without compensating these Amici for their substantial investment in such a resource—is of enormous concern.

Finally, because Amici's investments in natural resources are nearly always long-term, and because those investments are continually affected by new regulation based on changing political conceptions of the desirability of various land uses, it is crucial to Amici to have some measure of assurance regarding the safety of their investments. Without such assurance, less investment will necessarily occur. Unfortunately, under the current state of the law, it has become nearly impossible to predict when a court will consider a particular land use regulation to be a "taking." Worse, the decision of the lower court in this case has virtually eliminated what little certainty remains in the law by making the Constitution's just-compensation requirement revocable at will by legislatures.

For all these reasons, Amici are concerned that this Court develop a consistent, predictable approach to the Just Compensation Clause that will permit sensible and

efficient regulation of natural resources and, at the same time, ensure a measure of protection for reasonable investment expectations. The decision of the lower court is completely at odds with these concerns. Accordingly, for the reasons that follow, Amici urge that that decision be reversed.[1]

SUMMARY OF ARGUMENT

According to the lower court, so long as a legislature declares that it is regulating property for the purpose of "prevent[ing] serious public harm," the government need never pay just compensation, even where, as in this case, the regulation totally destroys the economic value of property. Pet. App. 3, 8, 10, 11-12, 16. That is not the law. This Court has repeatedly held that a taking occurs where regulation either does not "substantially advance legitimate state interests, . . . *or* denies an owner economically viable use of his land." *Keystone*, 480 U.S. at 485 (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)) (emphasis supplied); *see also Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987); *Hodel*, 452 U.S. at 296; *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 138 n.36 (1978). This Court should reaffirm that principle here and make explicit that no matter how important the state's asserted interest, that interest cannot justify avoidance of the Constitution's just-compensation requirement where regulation has destroyed all economically viable use of a person's property.

The Court should furthermore reject the proposition that merely by declaring an owner's use of his property to be a "nuisance," the legislature may *ipse dixit* avoid payment of just compensation. Nothing in the Constitution authorizes such avoidance. And nothing in the Constitution provides any standard whatever by which this Court may determine which uses of property are in fact

[1] This brief *amici curiae* is being filed with the consent of the parties, whose written statements of consent have been filed with the Clerk of the Court.

such a "nuisance" that they are not deserving of compensation after a taking. Moreover, the *ad hoc*, after-the-fact recognition of a "nuisance exception" completely undermines a primary purpose of the Just Compensation Clause: encouraging the use and development of property interests through the assured protection of those interests.

Furthermore, it is completely unnecessary for the Court to recognize and attempt to give content to a "nuisance exception" to the Just Compensation Clause. "Property" under that Clause is defined by state law. Accordingly, State legislatures have always had authority, subject to constitutional limitations, to prohibit uses of property that they may now or later consider noxious or a nuisance. However, for owners who acquire their property rights *prior* to such legislative action, the prohibition of further use necessarily regulates an existing "property" right. And where, as here, the regulation totally deprives the owner of all economically viable use, it necessarily constitutes a taking of "property" and, under the plain language of the Constitution, just compensation is mandated. The Court should so hold in this case.

ARGUMENT

I. WHERE A STATE DESTROYS ALL VALUE IN AN OWNER'S PROPERTY, IT MUST PAY JUST COMPENSATION FOR THAT DESTRUCTION

As noted by the lower court, this Court has taken into account several factors in determining whether a taking has occurred. Pet. App. 9. But as the lower court failed to recognize, the two key factors in the Court's analysis have been that land use regulation effects a taking—"if it 'does not substantially advance legitimate state interests, . . . *or* denies an owner economically viable use of his land.'" *Keystone*, 480 U.S. at 485 (quoting *Agins*, 447 U.S. at 260) (emphasis supplied); *see also Nollan*, 483 U.S. at 834; *Hodel*, 452 U.S. at 296; *Penn Central*, 438 U.S. at 138 n.36.

Here, the lower court thought the State's interest so substantial and important that it ignored *all* other factors considered by this Court, including the single factor that has always proved dispositive in the Court's cases—the complete destruction of the value of the owner's property.[2] As Chief Justice Rehnquist pointed out in *Keystone*, even in the so-called "nuisance" cases this Court has *never* approved a refusal to pay compensation where complete deprivation of economic value has occurred. 480 U.S. at 513-14 (Rehnquist, C.J., dissenting).[3]

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[2] The South Carolina Supreme Court did not question the trial court's finding in this case that the property owner lost all economically viable use of his land. Pet. App. 15, 37.

[3] In *United States v. Caltex*, 344 U.S. 149 (1952), this Court held that the government was not required to compensate the owners of oil terminal facilities destroyed to keep them from falling into the hands of an advancing enemy. That result is properly explained by the fact that the property would have been expropriated by the enemy had the government not destroyed it. *Id.* at 153, 155. Thus, the government did compensate the owner for all property that it was able to save and use for its own benefit. *Id.* at 151, 155.

The Court should not depart from these precedents here. Amici submit that where a *total loss* of property has been effectuated, no judicial balancing of interests can alter the fact that a taking of property has occurred or avoid the Constitution's command that just compensation be paid for that taking. We urge the Court to so hold in this case.

II. THE COURTS HAVE NO AUTHORITY—AND NO NEED—TO WRITE A "NUISANCE EXCEPTION" INTO THE JUST COMPENSATION CLAUSE

The Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." Here, there is no question that private property has been taken—completely—and that the taking was for public use; nevertheless, the lower court held that payment of just compensation is not required because the taking was designed "to prevent serious public harm." Pet. App. 3, 8, 10, 11-12, 16.

It is submitted that nothing in the Constitution authorizes this so-called "nuisance exception" to the just-compensation requirement. The Fifth Amendment could have provided that where the "public use" sought to be served was particularly compelling—as where the expected benefit was great or the expected harm severe—compensation need not be paid. But that is *not* what the Constitution provides. Its command for just compensation is categorical. It is submitted, therefore, that what this Court held nearly 70 years ago on this issue should control the outcome here: "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal*, 260 U.S. at 416.[4]

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[4] As this Court has more recently held, even a "public purpose of high order" will not insulate government from compliance with the just-compensation requirement. *See Hodel v. Irving*, 481 U.S. 704, 712 (1987).

In addition to the fundamental requirement that the plain language of the Constitution be followed, it is submitted that there are at least three additional reasons why the so-called nuisance exception should not be accepted by the Court. First, there is simply no principled guidance in the Constitution for such an exception. Once the courts begin making exceptions to the just-compensation requirement, by what standard will they grant or deny the exception? How great must the nuisance be? [5] How severe the harm? How large the expected benefit? [6] In other words, when does a taking that is a "mere" legitimate exercise of the police power—and is therefore compensable—cross the line and become such a "super" exercise of that power that the courts may deem the taking noncompensable?

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[5] It is not at all clear what a nuisance actually is, much less how its definition should be constitutionalized. As the authors of a leading text on torts have written: "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' . . . There is general agreement that it is incapable of any exact or comprehensive definition. Few terms have afforded so excellent an illustration of the familiar tendency of the courts to seize upon a catchword as a substitute for any analysis of a problem; the defendant's interference with the plaintiff's interest is characterized as a 'nuisance,' and there is nothing more to be said." W. Page Keeton, *et al., Prosser and Keeton on the Law of Torts* § 86 at 616-17 (5th ed. 1984).

[6] Advocates of an "exception" to the just-compensation requirement would argue, of course, that there is no reason to limit the exception to preventions of great public *harm*. Creations of great public *benefit* ought also to qualify. After all, avoidance of an injury is by definition a benefit; and failure to obtain a benefit may itself be regarded as an injury. As Justice Brennan wrote in *Penn Central*, the so-called "nuisance" cases rest "not upon any supposed 'noxious' quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy . . . *expected to produce a widespread public benefit* . . . ." 438 U.S. at 134 n.30 (emphasis supplied). Under that standard, the "nuisance exception" is completely without definable limits, to say nothing of being without constitutional foundation.

The answer is that the courts have no basis for drawing the line because under the Constitution there is no such line. For this reason alone, the courts should not be required to wrestle further with the scope and application of the nuisance exception. This Court should now say clearly that the exception does not exist—because the Constitution does not provide for it.

There is a further reason—one of great interest to Amici—why the Court should expressly disavow the claimed nuisance exception: to ensure stability of property rights in our economy. It has long been settled that the Just Compensation Clause was designed to ensure the protection of property rights created under state law. *See, e.g., Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 177-78 (1872). The present decision completely undermines this purpose and, at the same time, creates significant disincentives for those considering investing in any regulated sectors of our economy. For under the present decision, a State may not only decide, after the fact, that those who have invested millions in developing a project designed to serve the public interest are no longer serving that interest; but more importantly, the State may also declare, again after the fact, that in its view the investment has become so out of keeping with the public interest that it may be totally destroyed without compensation.

These Amici do not challenge the State's power to continuously restrike the balance between, say, environmental concerns and natural resource needs, provided that power is not exercised arbitrarily or irrationally. But Amici strenuously deny that the State has the option under the Constitution to strike the balance against natural resource needs, require the total destruction of property these Amici have committed to those needs, and do so without paying just compensation. Not only is such a result contrary to the Constitution, it is also directly contrary to the public interest. For if government becomes

authorized to retroactively destroy property rights in such fashion without paying compensation therefor, significant disincentives to investment in natural resources (as well as in other important national needs) will inevitably result. In the long run, the public will be the loser from any short-term compensation savings.

Finally, there is in any event *no need* for the Court to recognize and take upon itself the responsibility for designing the contours of a nuisance exception. This is because, as with the Due Process Clause, the definition of "property" under the Just Compensation Clause is a matter of state law, while the question whether a "taking" has occurred is a matter of federal constitutional law. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001-04 (1984) (taking occurred where plaintiff had trade secret property right under Missouri law); *Pennsylvania Coal*, 260 U.S. at 414 (taking occurred where mining company had subsidence right under Pennsylvania law); *cf. Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) ("property" interests protected by Due Process Clause are not created by the Constitution; they are created and defined by rules that stem from an independent source such as state law).

Thus, subject to constitutional limitations, the legislature is already authorized to prevent detrimental uses of property and to change its mind about what uses are detrimental. When the legislature prohibits a particular land use and land is *thereafter* acquired, no "property" is "taken" with respect to the prohibited use because no cognizable "property" interest exists within the meaning of the Takings Clause. *See United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945) ("property" as used in Takings Clause denotes "the group of rights inhering in the citizen's relation to the physical thing"). However, as to an owner who acquired his rights *prior* to the prohibition, the prohibition would necessarily extinguish an *existing* property right and, where the prohibition deprives the owner of all economically viable use, it effects a taking of his property.[7]

This approach to the nuisance problem accords with the language of the Constitution, removes the courts from the business of creating *ad hoc* nuisance exceptions for which no standards exist, and protects the settled property rights of parties, like Amici, with long-held vested interests backed by significant investment expectations. The Court should therefore require that South Carolina adopt it. Because that approach was plainly not followed here; because, instead, the State claimed authority to work a retroactive, total deprivation of *existing* property rights without payment of just compensation, the decision below should be reversed.

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[7] Amici recognize, based upon their own experience, that the nature of land use regulation is often such that it is not clear (as it is in this case) whether property rights were acquired before or after the effective date of a prohibition on use. In cases of ambiguity, the government's obligation to pay just compensation depends, under this Court's precedents, upon the reasonableness of the owner's investment-backed expectations at the time he acquired his interest and made his investment. *See, e.g., Ruckelshaus*, 467 U.S. at 1005-14.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the South Carolina Supreme Court.

Respectfully submitted,

Of Counsel:
EDWARD M. GREEN
General Counsel and Secretary
STUART A. SANDERSON
Senior Counsel
AMERICAN MINING CONGRESS
1920 N Street, N.W.
Washington, D.C. 20036

WILLIAM E. HYNAN
Senior Vice President
NATIONAL COAL ASSOCIATION
1130 17th Street, N.W.
Washington, D.C. 20036

ROBERT A. KIRSHNER
General Counsel
NATIONAL FOREST PRODUCTS ASSOCIATION
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

WILLIAM R. MURRAY
Counsel
AMERICAN FOREST RESOURCE ALLIANCE
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

GEORGE W. MILLER *
WALTER A. SMITH, JR.
JONATHAN S. FRANKLIN
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-6575
Counsel for Amici Curiae

* Counsel of Record

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DAVID H. LUCAS,

Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of South Carolina

BRIEF *AMICUS CURIAE* OF THE NORTHERN VIRGINIA CHAPTER OF THE NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PARKS, AND THE NORTHERN VIRGINIA BUILDING INDUSTRY ASSOCIATION, INC., IN SUPPORT OF THE PETITIONER, DAVID H. LUCAS

*JOHN HOLLAND FOOTE
JOHN F. CAHILL
GRAYSON P. HANES
HAZEL & THOMAS, P.C.
P.O. Box 12001
Falls Church, VA 22042
(703) 641-4200
**Counsel of Record*

Attorneys for Amici Curiae

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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BRIEF OF THE NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PARKS NORTHERN VIRGINIA CHAPTER, AND THE NORTHERN VIRGINIA BUILDING INDUSTRY ASSOCIATION, INC., AS AMICI CURIAE IN SUPPORT OF THE PETITIONER, DAVID H. LUCAS

INTEREST OF THE AMICI CURIAE

Pursuant to Supreme Court Rule 37, the Northern Virginia Building Industries Association, Inc. ("NVBIA"), and the Northern Virginia Chapter of the National

Association of Industrial and Office Parks, Inc. ("NAIOP"), submit this brief amicus curiae in support of the Petitioner, David H. Lucas. Written consent to the filing hereof has been granted by counsel for all parties, and copies of that consent have been lodged with the Clerk.

NAIOP is a trade association representing members who construct, develop and operate industrial and office parks. NVBIA is an association of construction and real estate development companies. As owners and developers of property who must conform to complex and detailed schemes for the management of land use, the members of both associations are daily concerned with regulations which can have a profound effect on their interests. They believe that this case raises important questions as to the outer limits of the Takings Clause and the

consequences of going beyond them. It presents an opportunity for this Court to hold that the deprivation of all economically viable use of private property, even when it is a consequence of a concededly bona fide exercise of the police power, may not be accomplished without just compensation. It is important that governments, and landowners large and small, have clear guidance as to when a regulation can, indeed, go too far.

SUMMARY OF ARGUMENT

This Court has consistently suggested that a land use regulation which denies an owner of property of all economically viable use of it effects a taking of that property compensable under the United States Constitution, without regard to whether that denial also advances the public good. The economically beneficial use of property is a right, not a government benefit. Although subject to

reasonable regulation, it is a right that cannot be fully taken for public use, without just compensation. Even to the extent that the police power creates a "nuisance exception" to the Takings Clause, that exception cannot apply to complete restrictions on use, or, as here, construction of a home.

The regulation in question here did not merely limit or reduce the economically viable use of David Lucas's property. It prohibited *all* economically viable use of it, and compelled it to serve exclusively the purposes of the state. In actual practice, therefore, the effect of the South Carolina Beachfront Management Act does not differ in consequential degree from a direct physical invasion of property.

The erroneous proposition that the police power may trump the Takings Clause in such circumstances is of increasing

significance. As initially conceived, land use controls regulated and restricted the uses to which particular properties could be put, and their effect was distributed relatively evenly across the community. In recent years the scope of traditional land use regulation has evolved dramatically. Today it encompasses a much wider variety of environmental and other legislative objectives. Many of these evolving land use controls are based on the assumption that the most effective way to achieve their objectives is profoundly to limit, or in extreme cases completely to preclude, use of land. In the case where such a regulatory scheme does in fact go so far as to eliminate all economically viable use of land, it simply goes too far.

A determination that the South Carolina Beachfront Management Act has in

this case effected a taking of Mr. Lucas's property without just compensation, however, will neither unleash a deluge of suits, nor significantly hamper the ability of governments to manage land use effectively. This case represents an outer limit, one that amici believe is only infrequently reached, but whose existence must be established.

ARGUMENT

I. THE DENIAL OF ALL RIGHT TO MAKE ECONOMICALLY VIABLE USE OF LAND CONSTITUTES A TAKING FOR WHICH JUST COMPENSATION IS REQUIRED, REGARDLESS OF THE LEGITIMACY OF THE GOVERNMENTAL PURPOSE INVOLVED.

A. A taking of all economically viable use of land is a compensable taking of a fundamental property right.

The Fifth Amendment provides in relevant part that "private property [shall not] be taken for public use, without just compensation." Its objective is to prevent the government from forcing individuals to bear public burdens, which

in all fairness should be borne by the public as a whole. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Takings occur, of course, where there is an actual exercise of the power of eminent domain, or where there has been a physical invasion of property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). They can also occur when a regulatory restriction on the use of property is so severe that it effectively conscripts that property for public use. This Court has conceded, however, that it has been unable to establish a set formula for determining whether the exercise of the government's power to regulate the use of property has resulted in a regulatory taking. *See Hodel v. Virginia Surface Mining and Reclamation Ass'n Inc.*, 452 U.S. 264, 295 (1981). But there can be no doubt that the issue is of primary significance in takings jurisprudence, and

this case, which is in lineal descent from previous regulatory takings cases, presents a prime opportunity to bring some order to the regulatory takings area. *See First English Evangelical Lutheran Church v. County of Los Angeles,* 482 U.S. 304 (1987); *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987); *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470 (1987). This case presents a clear example of the devastating effect that regulation can have on the use and value of private property when the government seeks to advance its purposes through land use regulation and thereby denies the owner all, or virtually all, economically viable use of land.

Amici emphasize that the notion that the government can reach with impunity so deeply into the bundle of rights constituting ownership of property as to deny all economically viable use of it,

without paying for the extinction of those rights, threatens the very bedrock notions of private ownership of land to which the Fifth Amendment is addressed. *See Keystone,* 480 U.S. at 511-515 (Rehnquist, J., dissenting.) If this case does not present a regulatory taking, it is difficult to imagine the case that would.

The trial court found that the effect of the South Carolina Beachfront Management Act[1] on David Lucas's property was total. Order of the Court of Common Pleas, ¶6, Appendix to the Petition for Certiorari at page 154-155. In order to avoid finding a taking on these facts, however, the South Carolina Supreme Court was constrained to misread *Keystone* to compel the conclusion that when a state exercises its police power to accomplish a bona fide public purpose, it is insulated

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[1] S.C. Code Ann. § 48-39-10, *et seq.* (Law Co-op. 1990).

from the Takings Clause even when that exercise strips property of all use. *Lucas v. South Carolina Coastal Council*, __ S.C. __, 404 S.E.2d 895 (1991). This would apparently be true whether the police power was addressed to a nuisance, or to any other goal that the legislature might identify.

Amici contend, to the contrary, that this Court has clearly suggested, if not directly held, that a taking occurs when all economically viable use of property has been stripped from it, without regard to the public purposes advanced.

A regulatory taking occurs when the regulation challenged fails substantially to advance a legitimate state interest, *or* when it denies an owner economically viable use of his land. *Agins v. Tiburon*, 447 U.S. 255, 260 (1980); *see also Hodel*, 452 U.S. at 295-96; *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 224-25

(1986); *Nollan*, 483 U.S. at 834. These requirements are not conjunctive. The first aspect of this test, upon which the South Carolina Court apparently rested its entire analysis, does not stand as a separate basis for the insulation of governmental conduct from the Takings Clause. Indeed, it may fairly be seen only as a "condition precedent" to the exercise of the regulatory power in the first instance, a restatement of the fundamental principle that all regulation must advance a legitimate state interest, and that if it does not, its effect on property is a taking. It has never served as a basis upon which to justify the elimination of all rights in private property except the barest right to possess it, and to exclude others from physical intrusion.

To say that a purpose is lawful, however, is not to justify any means of

accomplishing that purpose, and thus the second element of the regulatory takings test must come into play in the proper case. If the government so diminishes the value of land in advancing its good ends, that the land becomes worthless, then *without more*, it is a taking. While a takings analysis requires consideration of the particular incident of property which has been taken, and some such denials of right may not offend the Takings Clause, when a property owner is left with nothing more than good feeling regarding his land, the Constitution forbids it without payment. This Court has recognized that one of the most fundamental rights inhering in land ownership is the right to make some *economically viable use* of it, when it has been acquired with a bona fide expectation that it can be so used. *See Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 143 (1978) (Rehnquist,

J., dissenting). When the right to use has been stripped from ownership, property has been taken. No public purpose, however legitimate, can accomplish that result unless the costs of it are shared equally by the public.

Were it otherwise, then the fears expressed in Justice Harwell's compelling dissent below would be realized: there would never be a case in which diminution in value could constitute a taking. *Lucas,* __ S.C. at ___, 404 S.E.2d at 905 (Harwell, J., dissenting). It would, indeed, be difficult to say such a thing as a regulatory taking remains a viable concept. But this Court has suggested for more than fifty years that drastic diminution in value, a thing directly and inseparably related to the economically viable uses to which it can be put, can in the proper case effect a taking of property even in the face of the most

compelling exercise of the police power. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).[2]

B. The Court need retain no "nuisance exception" to the Takings Clause, but if it chooses to do so that exception is not controlling here.

Although amici do not believe that this Court need retain any "nuisance exception" to the Takings Clause, a determination that a taking occurs in circumstances such as those presented here would not be inconsistent with the continued existence of such an exception. The government may surely eliminate *some* nuisance uses of property without compensation for the loss of *those* uses.

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[2] In *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), the Court assumed because of the posture of that case that the Ordinance in question had taken all use of the Church's property. It concluded that were such denial of all use proved, it would constitute a taking, even if temporary, for which compensation would be required. In this case, the trial court found that all use had been denied the property. It would follow that a taking, temporary or permanent, has occurred.

E.g., Mugler v. State of Kansas, 123 U.S. 623 (1887); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). But this hardly leads to the conclusion that because the government may eliminate noxious uses, it may therefore eliminate *all* economically viable uses of property.[3] Such extreme sanction against private use of property in the advancement of a public purpose would not constitute regulation, but proscription worthy of a proconsul. The United States Court of Claims has rejected

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[3] As Amicus Pacific Legal Foundation has aptly noted in its Brief in Support of the Petition for Certiorari, there is a consequential distinction between those cases in which regulation has eliminated a *particular* use of a parcel of property identified as a nuisance (*see Mugler* and *Hadacheck, infra*, text accompanying this note; *See also Miller v. Schoene*, 276 U.S. 272 (1928)), and those situations in which regulation has eliminated *all* economically viable use of the property for any private purpose. *See* Brief in Support on Behalf of the Pacific Legal Foundation, at 6-12. *Compare Mugler*, (prohibition of the use of property as a brewery not a taking) *with Curtin v. Benson*, 222 U.S. 78 (1911) (prohibition on use of national park lands for grazing a taking). Presumably the property on which "nuisance uses" once existed could yet be put to other lawful and valuable use. Mr. Lucas's property plainly cannot be put to any other lawful uses, so long as it chances to remain adjacent to the Atlantic Ocean.

similar unwarranted extension of the nuisance exception, on the grounds that, if accepted, the argument "would render the concept of regulatory taking virtually meaningless." *Florida Rock Indus., Inc. v. United States,* 21 Cl. Ct. 161, 167 (1990).

Assuming that there is yet something to the nuisance exception beyond its function as a statement of the unquestioned power of government to abate nuisances, however, amici are concerned with the South Carolina Supreme Court's apparent equation of the exercise of the police power in this case, with the elimination of a nuisance. Taken to its logical extreme, the court's analysis would effectively mean that the construction of homes, offices, and businesses could constitute a public nuisance, if the government chose to say

so.[4] These are, of course, the very uses which constitute the economic lifeblood of amici's membership.[5] If no taking is found on the facts of this case, regulators would be granted license to extend their reach ever further, without the potentially sobering remedy of

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[4] The South Carolina Supreme Court's determination that Mr. Lucas's use of his property for a home site would constitute a nuisance was, of course, based solely upon his failure to contest the legitimacy of the State's purposes in seeking to protect beachfront property. So far as amici are aware no court has ever held that the construction of a home constitutes a nuisance, and we have not yet reached the point where people and the homes that they live in have been declared a form of pollution. In fact, property adjacent to Mr. Lucas already had homes on it which were beyond the reach of the Act. The implausibility of the South Carolina Court's use of the nuisance exception as applied to a single family residential use was aptly discussed by Judge Hall in his dissent in *Esposito v. South Carolina Coastal Council*, 939 F.2d 165, 173 n.2 (4th Cir. 1991) ("Living in a beach bungalow bears little resemblance to the noxious uses of property the Supreme Court has identified.") *See also Keystone*, 480 U.S. at 511-515 (Rehnquist, J., dissenting) (discussing limitations on the nuisance exception).

[5] Amici do not suggest that the power of the government to address such questions is limited by the Takings Clause. In this case, for example, it is uncontested that the state can forbid the construction of beachfront houses as a legitimate exercise of its governmental powers. The question is whether it may do so at no cost to the public.

compensation for those cases in which they go too far: it would be difficult to define, or even discern, an outer limit on regulatory authority to act without compensation if virtually complete diminution of value by the denial of economically viable uses of property is not a taking.[6]

C. The Beachfront Management Act is similar in effect to an actual possessory invasion by the state.

Mr. Lucas's property has not only been stripped of its private uses. It has been directly conscripted to public use. Under the Beachfront Management Act, no permanent or habitable structure may be

[6] Indeed, if the mere exercise of the police power is sufficient to immunize a regulation from being construed as a taking, then the only challenge that might be levied against such a regulation would be that it did not substantially advance a legitimate public purpose. Given the deference which courts properly give to the exercise of the legislative power in land use matters (*see, e.g., Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984)) such challenges could be even more difficult to mount than the already difficult task of demonstrating a taking.

placed on the Lucas property.[7] The effect is to compel the property to remain perpetually a part of the pristine South Carolina beachfront, precisely in order to advance the purposes of the Beachfront Management Act.

It is difficult to see how this compelled dedication of property to the services of South Carolina's legislatively-identified purposes, (and to the complete exclusion of any purposes which Mr. Lucas might have in good faith believed he might pursue under the lawful zoning of his land), is consequentially different from an *actual physical invasion* of his property for a public use. Had South Carolina sought to turn Mr. Lucas's lots into a park or a landing field, or to force access for a cable television line, there is no doubt that such impressment

[7] *See Lucas*, __ S.C. at ___, 404 S.E.2d at 896-898.

would have effected a taking. *See Loretto,* 458 U.S. 419 (1982). In *United States v. Causby,* 328 U.S. 256, 261-262 (1946), the Court recognized that if the frequency and altitude of airplane flights prohibited landowners from using their land, their loss would be as complete *as if the United States had entered the land and taken exclusive possession of it,* for the government had "exercise[d] complete dominion and control over the surface of the land[.]" The same is true here.

In all such cases, the government has compelled privately-owned land to be put to the direct attainment of a public end. Here, it has been applied to the state's ecological and tourism-related goals. No consequentially different result obtains than if the State had formally condemned Mr. Lucas's land, and assigned it to an agency for the purposes of the Beachfront

Management Act. *See Penn Central Transp. Co.,* 438 U.S. at 123 n.25.[8]

II. A DETERMINATION THAT A COMPENSABLE TAKING HAS OCCURRED IN THIS CASE IS POTENTIALLY CONSEQUENTIAL TO OTHER LAND USE REGULATIONS AS THEY MAY BE APPLIED TO INDIVIDUAL LANDOWNERS.

A. Land use regulation has evolved in recent years to include schemes which operate to preclude all use of land in some circumstances.

Land use management statutes, ordinances and regulations are, of course, the classic examples of the kinds of regulatory impositions which may, in furtherance of the public welfare, impose significant economic burdens on landowners. In most cases, however, the burden on the landowner will be without constitutional effect. *See Penn Central*

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[8] The similarity between actual physical invasions and regulatory invasions has been often addressed before, and this Court has "never embraced the proposition that a 'taking' can never occur unless the government has transferred physical control over a portion of a parcel." *Penn Central Transp. Co.,* 438 U.S. at 123 n.25.

Transp. Co., 438 U.S. at 139-40 (Rehnquist, J. dissenting).

Historically, however, zoning enabling acts permitted governments only to regulate and restrict uses of property. Under traditional zoning enabling legislation, uses are categorized, land is divided into zones or districts in which those uses are permitted, and either general or specific regulations are imposed on the conduct of the uses permitted. The value of property can be dramatically enhanced, or reduced, by the requirements of such ordinances, and even though such schemes are unquestionably constitutional on their face (*Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926)), it has long been plain that, as a matter of due process at least, they can be unconstitutional as applied to particular properties. *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

Over the past two decades, however, land use regulation has changed significantly as environmental and other preservationist concerns have loomed ever larger. In many new land use regulatory schemes, the principal thrust of the regulatory approach is not simply the regulation of land use, but its elimination: the public purposes which are advanced are deemed best advanced by the preservation of some or all of a parcel undisturbed.[9]

As but one example of this kind of regulatory approach, one that directly affects amici, landowners in certain Tidewater Virginia jurisdictions have been subject since 1988 to the provisions of the Chesapeake Bay Preservation Act, Va.

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[9] *See* Burton, *Predatory Municipal Zoning Practices: Changing the Principles of Constitutionality in the Wake of the "Takings Trilogy"*, 44 Ark. L. Rev. 65, 72 (1991) (discussing current government regulatory strategy in the context of the Fifth Amendment).

Code Ann. § 10.1-2100 *et seq.* (Michie 1989), and Final Regulations, VR 173-02-01, 7:5 Va. Regs. Reg. 699-712, December 3, 1990. Under the requirements of the Bay Act, certain localities are required to adopt local ordinances conforming to state regulatory requirements for the reduction of non-point source pollution escaping into the Chesapeake Bay, to protect and enhance the quality of water in the Bay. The regulatory goals and objectives of the Act are thus similar to those of the South Carolina Beachfront Management Act.[10]

The primary land use mechanism employed to advance the goals of the Virginia Bay Act is a virtually complete prohibition on the use of properties

[10] In addition to the Bay Act, Virginia has its own Coastal Primary Sand Dune Protection Act (Va. Code Ann. § 62.1-13.21, *et seq.* (1987 & Supp. 1991)), that operates much as does the South Carolina Act with specific regard to sand dune erosion.

located within certain identified "Resource Protection Areas" (RPAs), and within a 100 foot undisturbed buffer surrounding those areas. Va. Code Ann. § 10.1-2107; VR 173-02-01 § 3.2 (B) (5), § 4.3.[11] No uses are permitted in RPAs or their buffer zones except "water-dependent facilities", and under the provisions of the regulations it is plain that in many cases there will be, in fact, *no* uses which can be made of property subject to these requirements.[12] There will almost

[11] Resource Protection Areas, or RPAs, consist of tidal wetlands, non-tidal wetlands connected by surface flow and contiguous to tidal wetlands or tributary streams, tidal shores, and a 100 foot buffer zone located adjacent to and landward of each of these components, and along both sides of a tributary stream. VR 173-02-01 § 3.2 (B) (1-5).

[12] A "water-dependent facility" is a development of land that cannot exist outside of an RPA, and must be located on the shoreline by reason of the intrinsic nature of its operation. Such uses include, but are not limited to, ports, intake and outfall structures of power plants, water and sewer treatment plants, and storm sewers, marinas and other boat-docking structures, beaches and the like, and fisheries and other marine resources facilities. VR 173-02-01 § 1.4. In many cases, of course, permission to make a "water-dependent use of, say, a non-tidal wetland, is simply impossible

certainly arise circumstances in which the case-specific application of these requirements will completely restrict the use of an entire parcel of land.

In some measure, of course, the restrictions on use to be found in the Chesapeake Bay Act, the South Carolina Beachfront Management Act, and similar enactments nationwide, resemble ordinary setbacks long recognized as legitimate exercises of the zoning power. The consequential difference between setbacks and the features of these new regulatory schemes, however, is that while the former relate to buffers measured from the outer perimeter of a discrete parcel of property, reservations of property under such statutes as the Chesapeake Bay Act know no limitation. They are dependent not upon property boundaries, but upon the

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even in theory.

existence or nonexistence of natural features. Such restrictions on use possess, therefore, the potential for precluding the economically viable use of property otherwise useable under a traditional zoning scheme, in a way that setbacks customarily do not. To the extent that such regulations work the kind of result that has occurred in this case, they effect a taking as surely as the Beachfront Management Act has on Mr. Lucas's land.

B. A state's ability to administer programs of land use management would not be adversely affected by a determination that Mr. Lucas's property was taken, because this case represents the outer limit of regulatory power.

Amici do not suggest that land use regulation which seeks to achieve ends not originally contemplated by traditional zoning ordinances, or which seek to protect the environment or advance preservationist policies, are in any sense

facially infirm. In the vast majority of cases, the Takings Clause is not implicated by even serious diminution in value of land. Land use ordinances possess constitutional demon seed only when, as here, they operate to deny a landowner of all or virtually all economically viable use of his land.

A decision in favor of Mr. Lucas will not toll the death knell of land use regulation, traditional or innovative, and a state's authority to protect the environment through appropriately tailored regulation will not be emasculated thereby. But the effect on the individual landowner can be so severe that the public should in fairness bear the cost of that effect.

CONCLUSION

The amici respectfully request that this Court reverse the judgment of the Supreme Court of South Carolina.

Respectfully Submitted,

National Association of Industrial and Office Parks, Inc., Northern Virginia Chapter, and the Northern Virginia Building Industry Association, Inc.

*John Holland Foote
John F. Cahill
Grayson P. Hanes
Hazel & Thomas, P.C.
P.O. Box 12001
Falls Church, VA 22042
(703) 641-4200
*Counsel of Record

Attorneys for the Amici Curiae

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DAVID H. LUCAS,

Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

On Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF REALTORS® IN SUPPORT OF PETITIONER

RALPH W. HOLMEN
Counsel of Record
430 North Michigan Avenue
Chicago, Illinois 60611
(312) 329-8375

Counsel for Amicus Curiae
NATIONAL ASSOCIATION
OF REALTORS®

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

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BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF REALTORS® IN SUPPORT OF PETITIONER*

INTEREST OF AMICUS

The NATIONAL ASSOCIATION OF REALTORS® (hereinafter "NAR") is a not-for-profit professional association comprised of approximately 750,000 persons engaged in all phases of the real estate business.

* All parties of record in this case have consented pursuant to Supreme Court Rule 36.1 to the filing of this *amicus curiae* brief in support of Petitioner. These consents are filed herewith.

NAR was created in 1908 to promote and encourage the highest and best use of land, to protect and promote private ownership of real property and to advance professional competence in the rendition of real estate services.

NAR includes among its members real estate brokers, managers, appraisers, counselors, and a variety of other participants in the residential, commercial, industrial, farm and investment real estate markets. Through its many programs and the programs of its affiliated Institutes, Societies and Councils, NAR has been involved in matters of concern to property owners for over three quarters of this century. Of the issues which have concerned NAR, few, if any, have been more fundamental or of greater importance than the preservation of private property rights as established by the United States Constitution. This commitment to private property rights is the cornerstone of NAR, for without such rights there would be no ownership, development, transfer, or enjoyment of real estate.

At stake in this case is the vitality of the protection afforded property owners by the Fifth and Fourteenth Amendments of the United States Constitution against the uncompensated "taking" of property and the corresponding rights and benefits of property ownership. The decision below, unless remedied by this Court, will substantially if not entirely undermine the viability of the protection provided by those Constitutional provisions and this Court's precedents interpreting them.

NAR is well-positioned to recognize the gravity of this threat. NAR's members, who are involved in upwards of 80% of real property resale transactions, span the nation. Particularly interested in this case are those members of NAR in coastal areas, who are seriously concerned about the debilitating effect of the decision below on property rights and values in their areas, and on the right of their

clients and customers owning or purchasing coastal properties to enjoy the fruits of their investments. The comprehensive involvement of NAR and its members in land development, investment and sale provides NAR with a clear understanding of the impact regulatory actions such as the one at issue here have on the enjoyment and exercise of constitutionally protected property rights.

NAR does not propose to duplicate the legal arguments presented in the Petitioner's brief, but rather endorses and urges to this Court the Statement of the Case and legal arguments set forth in therein. The purpose of NAR in submitting this brief *amicus curiae* is to add the voices of the hundreds of thousands of NAR members and the millions of American property owners they serve to the chorus of others concerned with the dangerously limiting construction of the Fifth Amendment's guarantee of private property rights articulated by the court below.

SUMMARY OF ARGUMENT

The Fifth Amendment's guarantee that private property shall not be taken without payment of just compensation is unqualified and absolute. This Court has occasionally condoned regulation which prohibited particular uses of property found detrimental to the public health, safety or welfare. Such regulation has been tolerated, despite the Fifth Amendment's guarantee, on the premise that it is necessary to prevent a public injury which the property owner is without an inherent right to cause. In the case of challenges to regulation which wholly eliminates all use of property in the name of preventing such nuisance-like activities, however, this Court should require a high level of scrutiny to be exercised. This more demanding analysis

is necessary to confirm objectively that the nuisance purportedly caused by use of the property is genuine, substantial and legitimate, not simply an economic concern, and that other useful or economically beneficial uses are not also proscribed.

ARGUMENT

I. The Fifth Amendment Unequivocally Requires Just Compensation To Be Paid

This case raises the question of the scope of protection afforded property owners by the Just Compensation Clause of the Fifth Amendment, which provides that ". . . (P)rivate property shall not be taken for public use, without just compensation." U.S. Const., Amendment V. NAR urges this Court to prevent emasculation of that protection by condemning judicial deference to the claim that a severe restriction on land use is necessary to serve the public interest or prevent a public injury.

The Just Compensation Clause has obvious application to the sovereign's exercise of the power of eminent domain. Beginning with this Court's seminal decision in *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922), however, it has been understood that land use regulation that "goes too far" may also result in a compensable taking. 260 U.S. at 415. A substantial body of jurisprudence of both this Court and lower Federal and state courts have wrestled with the implications of this pronouncement. Much of this litigation has focused on the question of how much a land use regulation must diminish an owner's property interests and rights to constitute a "taking" requiring compensation. Although various tests have been

formulated for making that determination, *see Agins v. Tiburon*, 447 U.S. 255 (1980) and *Penn Central Transportation Co. v. New York*, 438 U.S. 104 (1978), this Court has been "unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government." *Penn Central*, at 124. Nevertheless, the dictate of the Fifth Amendment is clear, and absolute: When a taking (however defined and determined) occurs, the Constitution guarantees the owner the right to receive compensation. *First English Evangelical Lutheran Church v. Los Angeles*, 482 U.S. 304, 315 (1987), citing *Jacobs v. United States*, 290 U.S. 13, 16 (1933). *First English* even made it clear that this requirement extends so far as to include property taken for only a temporary period. In such circumstances, this Court has declared that compensation is due for the period during which the owner's property rights were denied. No qualification or condition applies to government's obligation to pay compensation for the regulatory taking of property.

II. The Decision Below Improperly Enlarges the Scope of This Court's Prior Application of the "Nuisance Exception"

A. This Court's Use of the Nuisance Exception

Despite the unconditional language of the Just Compensation Clause, this Court has held that in some circumstances particular uses of property may be prohibited without invoking the government's obligation to pay compensation. In cases such as *Mugler v. Kansas*, 123 U.S. 623 (1887), *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), *Miller v. Schoene*, 276 U.S. 272 (1928), *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), and most recently, *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S.

470 (1987), this Court declined to find a compensable taking of property rights even though specific uses of property were forbidden. This Court reached that result by holding that the particular uses were offensive, injurious or noxious to the public health, safety or well-being, and that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." *Mugler*, 123 U.S. at 665. In *Keystone*, this Court went on to explain that "since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not 'taken' anything when it asserts its power to enjoin nuisance-like activity." 480 U.S. at 491, n.20. In *First English*, this Court also suggested that the conclusion that a compensable taking had occurred might be avoided by "establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations." 482 U.S. at 313. Put in terms of the familiar "bundle of rights" analogy of property ownership, this logic infers that the use of property in a particularly injurious manner is not a strand which is within the bundle at all, so no right is taken when one is denied the opportunity to use the property in that fashion.

As Chief Justice Rehnquist pointed out in his dissent in *Keystone*, however, this Court's application of the "nuisance exception" to the Constitutional guarantee of compensation for the taking of property has heretofore been confined to cases where the prohibited uses were discrete and narrow, and other non-noxious uses presumably remained available to the property owner.[1] Accordingly, the

[1] *Keystone*, 480 U.S. 470, 513 (Rehnquist, J., dissenting). The one possible exception to this is the *Keystone* case itself, where the

(Footnote continued on following page)

results in these cases probably could be justified on the alternative basis that the property rights of the owners were not sufficiently diminished to constitute a taking of the property. Since only specific uses of their properties had been forbidden, the owners did not and probably could not have shown that they had been wholly denied "economically viable use of (the) land," *Agins*, 447 U.S. at 260, so that it could be said that no taking occurred for that reason as well. In *Keystone* this Court did, in fact, expressly articulate that alternative basis for its conclusion that no taking occurred. 480 U.S. 470, 493.

B. Use of the Nuisance Exception by the Court Below

In the present case, Petitioner is precluded from using his property in a manner which is neither narrow nor discrete, but which is sweeping and broad. Petitioner's complaint alleged that the building prohibition of the Beachfront Management Act denies him all economically viable and beneficial use of his property and renders it valueless. The trial court, in a finding undisturbed by the South Carolina Supreme Court, agreed. Thus, the South Carolina Supreme Court's application of the "nuisance exception" principle in this case is, contrary to the court's claim, much more than a "straightforward" application of the doctrine heretofore employed by this Court. The result reached below is an inappropriate and Constitutionally unacceptable extension of this Court's decisions employ-

[1] *continued*
majority held the nuisance principle applicable but also held that a taking had not occurred because not all use of the property at issue had been taken. The dissent took the position that all interest in and use of *particular* coal deposits had, in fact, been eliminated, so that "all use" of the property, so defined, had been eliminated.

ing the "nuisance" analysis to a circumstance where regulation eradicates all rights of use of a property.

This Court should condemn such an expansive interpretation of the nuisance rule. Where regulation produces complete extinction of an owner's right to use and enjoy his property in *any* useful fashion, the Fifth Amendment unequivocally requires compensation to be paid. If the government advances the justification that the prohibition is necessary to prevent property use which will cause a serious injury to the public weal, that explanation should be subjected to vigorous and comprehensive scrutiny to verify its legitimacy. The payment of just compensation required by the Fifth Amendment may be denied if, but only if, the regulation survives such analysis. The court should objectively confirm that the uses prohibited by the regulation are, in fact, truly noxious and therefore *not* strands within the owner's "bundle of rights."

There may be few ordinances which so comprehensively deny property use as to merit such extraordinary scrutiny, although the present case certainly appears to present a strong candidate for such analysis. Of those, there may be even fewer which need be that broadly restrictive in order to remedy effectively a legitimate social evil. In those rare instances, denial of compensation may be warranted. The covenant of the Just Compensation Clause, however, demands zealous efforts by courts to safeguard property owners from unwarranted and uncompensated regulatory appropriation of their property rights.

III. Heightened Scrutiny of Regulatory Takings is Necessary When All Uses of Property Are Eliminated

A. Why Close Scrutiny is Required

In addressing the question of when, if ever, and under what circumstances land use regulation may eradicate all beneficial uses of property without invoking the government's obligation to pay compensation, two considerations discussed above provide the appropriate foundation for analysis. First, because governmental action which constitutes a taking of property rights necessarily implicates the "constitutional obligation to pay just compensation," *First English*, 482 U.S. 304, 315, citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960), courts must be keenly sensitive to the draconian nature of regulation resulting in uncompensated elimination of all right to use and enjoy a particular property. Such radical action is wholly abhorrent to the Fifth Amendment's otherwise inviolate guarantee. In order to fulfill the Fifth Amendment's promise of the right to enjoy property rights free of excessive governmental restriction, courts should be meticulously hostile, rather than deferential and accommodating, to regulations which effect broad restraints on property rights. Thus, a court's review of comprehensively restrictive land use regulations should be based on a predisposition *against* the validity of such ordinances and *towards* protection of the owner's rights as secured by the Fifth Amendment.

Second, as explained above, the rationale for the conclusion that the nuisance exception applies in certain cases is that the regulation does not take an inalienable right of the property owner because the proposed use is so noxious that it is not one to which the owner is entitled. In addition, in many and perhaps even most nuisance cases, only a few discrete uses are proscribed, so that the regulation may elude characterization as a taking because not

all use of the property is prevented. Other non-noxious and economically viable uses remain available to the property owner.

As a result, it may be sufficient to examine narrow and specific land use restrictions with the measure of exactitude prescribed in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), that is, to determine whether the regulation "substantially advances" a legitimate state interest. The familiar "rational relationship" test of due process analysis may also be adequate. In either case, a less demanding inquiry may be warranted because there exists the alternative basis for the conclusion that no taking has occurred, since not *all* uses (and thus presumably not all "economically viable" uses) are prohibited.

But, where, as in the present case, the regulation is so encompassing as to forbid all reasonably available and viable uses of the property, the rights guaranteed by the Fifth Amendment are grievously imperiled. The owner is deprived of the opportunity to use, enjoy and benefit from his property in any manner whatsoever. The threat of such wholesale destruction of property rights requires that extraordinary care be exercised to insure that the Constitutional guarantees retain vitality and meaning. The government should thus be obliged to carry a weighty burden to clearly and unequivocally substantiate the denial of compensation by establishing beyond doubt that the regulation is necessary to, and does in fact, eliminate *only* those uses of the property so inimical to the public well-being that they cannot be said to be "rights" of the owner. Correspondingly, courts reviewing such regulations must exercise a substantially elevated level of scrutiny to validate the applicability of the nuisance exception and its underlying rationale.

B. Elements of the Close Scrutiny Analysis

The enhanced level of inquiry of regulation producing a total deprivation of property use should incorporate several concerns. First, as in the case of regulations with a less pervasive impact on the owner's opportunity to use his property, the court should confirm that the objective and effect of the regulation is not simply to confer on the public a desirable benefit at the expense of the owner's opportunity to enjoy his property rights, but to avoid a genuine threat of injury to public health, safety or welfare.

Second, the regulatory purpose and the public injury to be thereby averted should be carefully and independently assessed and verified by the court to be, as this Court described the legislative purpose of the statute at issue in *Keystone*, "genuine, substantial and legitimate. . .," 480 U.S. at 486. Similarly, the court must conclude that the injury is one which would inevitably result from the proposed property use. The court should not deferentially accept the assertions of the legislative or regulatory body adopting the regulation, but must require that the threat of injury, and the prophylactic effect of the regulation's limitations on property use, be justified by facts, data and reasoned and sound conclusions drawn therefrom. The court should not hesitate to evaluate independently and objectively such data to determine whether the use presents a legitimate threat of public harm. The court should further establish that the threatened harm is a substantial one, rather than a minor annoyance to the community.

Third, the public injury to be prevented by application of the regulation at issue must not be one which is simply deleterious to the economic well-being of the public, but rather one which presents a significant threat of physical harm to persons or private or public property. In

striking the appropriate balance between protection of public interests and invasion of the ordinarily inviolate right of property owners to be free from uncompensated appropriation of their property, the property owner should not be obligated to carry the economic welfare of the community on his back. See *Keystone*, 480 U.S. 470, 513 (Rehnquist, J., dissenting).

Finally, the court should carefully evaluate the scope of the regulation to insure that it is no more encompassing than absolutely necessary to circumvent the substantial public injury which is threatened. Since the proscriptions of certain uses of the property may be tolerated only because such uses are harmful to the public well-being, and are therefore not uses to which the owner can claim a right, that justification does not apply to other non-injurious uses also within the owner's "bundle of rights." Thus, other non-harmful uses should not and may not also be prohibited. This consideration may also cause regulators to exercise restraint in regulating or prohibiting property uses which may threaten public harm if they come to recognize that unduly broad restrictions are likely to be stricken, or invoke the obligation to pay just compensation, as intolerably invasive of the rights of property owners.

This intensified inquiry into whether the nuisance principle genuinely applies is necessary to prevent the nuisance principle from becoming the exception that engulfs the rule. As this case itself makes clear, land use regulators have begun to learn the lessons of *Mugler* and its progeny, including *Keystone*: a simple declaration that regulation is necessary to prevent property use contrary to the public well-being may avoid the requirement that compensation be paid for depriving an owner of the use of

his property. There are, to be sure, legitimate and significant public interests that merit protection. Property owners have no inherent right to use their property in ways which are likely to result in a variety of *bona fide* social evils, such as pollution of public water supplies or the air breathed by all, or subjecting citizens to the threat of exposure to radioactive or other hazardous materials. But where the property owner loses all value of or opportunity to use his property in an economically viable fashion, the Just Compensation Clause of the Fifth Amendment entitles the affected property owner to no less than a court's vigorous and painstaking efforts to verify that the regulation is narrowly circumscribed to prohibit only uses to which the owner has no inherent right or entitlement.

CONCLUSION

The decision of the South Carolina Supreme Court employs a formulation of the nuisance principle which will permit land use regulators to expeditiously emasculate the promise of the Fifth Amendment that property rights may not be taken without compensation. Should this Court decide to allow all beneficial use and enjoyment of property to be denied in certain limited circumstances to prevent a substantial and legitimate injury to the public, it should also require lower Federal and state courts to

undertake a demanding analysis of that justification of the usurpation of Constitutionally protected property rights.

Respectfully submitted,

RALPH W. HOLMEN
Counsel of Record
430 North Michigan Avenue
Chicago, Illinois 60611
(312) 329-8375

Counsel for Amicus Curiae
NATIONAL ASSOCIATION
OF REALTORS®

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Respondent.

On Writ of Certiorari to the Supreme Court
of the State of South Carolina

BRIEF OF THE WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, PROPERTY RIGHTS PRESERVATION ASSOCIATION, INC., AND FAIRNESS TO LAND OWNERS COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Daniel J. Popeo
Paul D. Kamenar
(Counsel of Record)
Washington Legal Foundation
1705 N Street, N.W.
Washington, D.C. 20036
(202) 857-0240

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

No. 91-453

DAVID H. LUCAS,

Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of South Carolina

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BRIEF OF THE WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, PROPERTY RIGHTS PRESERVATION ASSOCIATION, INC., AND FAIRNESS TO LAND OWNERS COMMITTEE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center based in Washington, D.C. with over 120,000 members and supporters nationwide.[1] WLF regularly appears before federal and state courts promoting economic liberty, free enterprise principles, and a limited and accountable

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[1]By letters filed with the Clerk of the Court, the parties have consented to the filing of this brief.

government. WLF has devoted substantial resources to litigating environmental issues including those involving governmental restrictions on the use of wetlands, and has appeared in this and other courts on the application of the Just Compensation Clause of the Fifth Amendment to regulatory measures. *See, e.g., Yee v. Escondido*, No. 90-1947, *cert. granted*, 112 S.Ct. 294 (1991); *Pennell v. City of San Jose*, 485 U.S. 1 (1988); *Loveladies Harbor, Inc. v. United States*, No. 91-5050, (Fed. Cir. argued Oct. 9, 1991).

The Allied Educational Foundaiton (AEF) is a non-profit charitable and education foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law and economics, and has appeared before this Court with WLF in *Yee v. Escondido* and other cases.

The Property Rights Preservation Assocation, Inc. is a non-profit organization organized by beachfront homeowners along the coast of Florida who suddenly find themselves facing the same kind of setback restrictions found in South Carolina's Beachfront Management Act before this Court. While the Florida homeowners currently occupy their homes, the Florida law, as does South Carolina's BMA, prohibits current homeowners from rebuilding or repairing their homes that are seriously damaged by fire or acts of nature, thereby greatly reducing the value of their home and underlying property. The law thus leaves these property owners with a form of a life estate (based on the "life" of the structure) rather than fee simple ownership. They find themselves in the same position as the property owners in *Esposito v. South Carolina Coastal Council*, 939 F.2d 165 (4th Cir. 1991), and will be directly affected by the decision in this case.

The Fairness to Land Owners Committee (FLOC) is a Maryland-based national organization with over 8,000 members who are property owners faced with confiscatory land-use regulations involving wetlands, wildlife refuges, and similar laws. FLOC is dedicated to protecting property rights, especially the right to the prudent use of one's land, and is active in educating the public and lawmakers about the difference between conservation and confiscation.

Amici will present a broader perspective of the issues presented in this case which will assist this Court in deciding them in such a way so as to give clear guidance to lower courts in adjudicating not only the clear cases such as this one where the landowner's property was totally taken, but in adjudicating the far more common cases where the government requires the owner to forfeit his right to develop a portion of his land.

STATEMENT OF THE CASE

The petitioner purchased two oceanfront single-family residential lots in Charleston County, South Carolina in 1986 for $975,000 intending to build a home for his family on one lot, and to build a home on the other for resale.

In 1988, South Carolina enacted the Beachfront Management Act, S.C. Code Ann. § 48-39-10 (BMA), to enhance and preserve the beach/dune system, *inter alia*, for "indigenous flora and fauna," *id.* § 2(1)(c), "natural beauty," *id.* § 2(1)(d), "tourism," *id.* § 1(1)(b), and to stem "normal erosion," *id.* § 2(1)(a).[2] In short, South Carolina wishes to promote the general welfare of the state by preserving and enhancing its coastal areas as natural beach parks.

While the law's stated goal is to have a beach management plan to include "a *gradual* retreat [of development] from the [beach/dune] system over a forty-year period," *id.* § 2(2), and to "*discourage* new construction in close proximity to the beach/dune system," *id.* § 1(d)(6) (emphasis added), the means chosen to implement these goals was an immediate and abrupt ban on all permanent construction, including dwellings, within mandated setback lines that totally engulfed petitioner's property. It is undisputed

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[2] As will be discussed *infra*, the price paid for the lots and the date of the enactment of the BMA are essentially irrelevant in considering whether a taking of the property has occurred in this case.

that the law precluded the reasonable development and economically viable use of petitioner's property.[3]

The trial court found that the law worked a permanent and total loss of the value of Mr. Lucas's property that was tantamount to a taking under both the South Carolina and United States Constitutions, and awarded just compensation. In a 3-2 decision, the Supreme Court of South Carolina reversed, holding that petitioner's proposed plan to build a single-family home on his property that would otherwise meets building code requirements nevertheless constitutes, or is akin to, a public nuisance, and further holding that no compensation is due when government regulations prohibits a property owner from using his property for purportedly nuisance-like activities. 404 S.E. 2d 895, 902 (S.C. 1991). The lower court did not factor in at all the extreme burden that the BMA places on the property rights of the landowner, purporting to rely on this Court's decision in *Keystone v. Bituminous Coal Assoc. v. Debenedictis*, 480 U.S. 470 (1987), and *Mugler v. Kansas*, 123 U.S. 623 (1887), that such analysis is unnecessary for nuisance-like activities. *Id.*

SUMMARY OF ARGUMENT

I. This case deals with one of the most fundamental of all property rights protected by the federal Constitution from being taken without just compensation, the right to build a home on one's own land. It is a right which the State of South Carolina has acknowledged by allowing Mr.

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[3] While the respondent has noted that petitioner's lots have on occasion "been under water or subject to tidal intrusion" since 1963 (Resp. Opp. Cert. at 1), that fact does not further respondent's argument; if anything, it helps the petitioner. For not only does the BMA prevent petitioner from building on his property, he may even be prevented by other provisions of this law or related ones from taking measures to protect his property from being further flooded. "Indeed, it may be more likely that denying a permit to fill frequently flooded property will prevent economically viable use of the property than denying a permit to fill property that is wet but not flooded." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127, n.4 (1985).

Lucas's two residential lots to be created by state law and by allowing Mr. Lucas to purchase them. A complete ban on construction entirely destroying the value of a lot can scarcely be characterized as anything less than a *direct* and *special* invasion of Mr. Lucas's fundamental rights.

While this Court has frequently upheld regulations imposed primarily for health and safety concerns limiting the height of buildings, *Welch v. Swasey*, 214 U.S. 91 (1909); limiting the character of the buildings which may be constructed, *Euclid v. Ambler Realty, 272 U.S. 365 (1926)*; requiring that buildings be set back a reasonable distance from a public street for fire safety reasons, *Gorieb v. Fox*, 274 U.S. 603 (1927); or specifying the lot size, *Agins v. City of Tiburon*, 447 U.S. 225 (1980); a land-use regulation rendering "an ordinary building lot wholly useless," *see Hudson Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) --in effect, a 100 percent setback requirement-- has never been upheld by this Court.

That the landowner in this case did not challenge the legislative reasons for the enactment of the law or its validity, does not mean, as the South Carolina Supreme Court erroneously concluded, that the petitioner conceded that *his* building of a home on each of his two lots constitutes a legal public nuisance, is akin to one, or that *Mugler* and its progeny created a nuisance exception to the Fifth Amendment relieving the court of its duty to independently weigh the benefits to society and the burdens placed on the property owner produced by the operation of the law.

Amici submit that building a home on a residential lot is a reasonable use of one's property that cannot be considered a public nuisance, and that a court must always weigh both the benefits and burdens of a land-use restriction to determine whether a taking has occurred.

II. Also crucial to this balancing inquiry and often overlooked or misinterpreted by courts in regulatory takings cases of this type, is the "character of the governmental action," a factor referred to in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) and *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986). In this case and in the enforcement of similar

environmental federal and state laws, the state is requiring the property owner to, in effect (and in some cases, in fact), dedicate his land as open-space for the benefit of the public. This is tantamount to physically ousting the owner from his property. In doing so, the state has conveniently avoided the customary exercise of its eminent domain power to purchase parks and other similar open spaces for the public benefit.

In short, whereas the California Coastal Commission in *Nollan* was properly characterized by this Court as engaging in an "out-and-out plan of extortion" by demanding that the owners provide a public easement as a condition for rebuilding their home, *Nollan v. California Coastal Comm'n, 483 U.S.* 825, 837 (1987), the South Carolina Coastal Commission in this case has brazenly gone much further and engaged in what could be aptly called an out-and-out plan of confiscation. As *amici* will demonstrate herein, the arguments advanced by South Carolina to preserve its beaches in this way are based on nothing more than the same substance which it desires to protect.

ARGUMENT

I. THE JUST COMPENSATION CLAUSE REQUIRES A COURT IN ALL LAND USE CASES TO IDENTIFY THE PARTICULAR PROPERTY RIGHT AT RISK AND TO WEIGH THE BURDEN PLACED ON IT WITH THE PUBLIC BENEFITS SOUGHT TO BE ACHIEVED BY THE REGULATION.

The Fifth Amendment provides that "private property" shall not "be taken for public use, without just compensation." This clause was drafted in response to the widespread practice of uncompensated takings by colonial and state legislatures -- a practice rejected by the framers of the Constitution. *See, e.g.*, Treanor, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 Yale L.J. 694, 695 (1985). The concept of just compensation, however, was not invented

by the framers of the Constitution. It may be traced at least as far back as 1215 when the Barons of England exacted from King John the Magna Carta which contains at least three references to this right.[4] It is also deeply rooted in the spirit of the common law.[5] Our Founding Fathers firmly believed that "the '[o]ne great obj[ect] of Gov[ernment] is personal protection and the security of Property.'" 1 The Records of The Federal Convention of 1787, 302 (M. Farrand ed. 1911). Madison flatly stated that "[g]overnment is instituted to protect property of every sort . . . ." J. Madison, Property, 6 *The Writings of James Madison*, 101 (G. Hunt ed. 1906).

While the Fifth Amendment prohibits the taking of private property for public use without just compensation, the U.S. Constitution does not define what constitutes property. As this Court has repeatedly recognized, "[p]roperty interests. . . are not created by the [United States] Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source" such as state law or the common law. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) *quoting Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Preseault v. ICC*, 110 S.Ct. 914, 926 (1990) (O'Connor, J., concurring); *Keystone, supra*, 480 U.S. at 520 (1987) (Rehnquist, C.J., dissenting).

On some occasions, the right or interest has been defined by the statutes of a particular state. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984) (trade se-

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[4] *See* Magna Carta, arts. 28, 30 & 31.

[5] *See Moale v. Baltimore*, 5 Md. 314, 321 (1854). Indeed, South Carolina's Takings Clause appears to be more protective of property rights than the similar federal provision because it requires that property cannot be taken for public use "without just compensation being first made therefor." S.C. Const. Art. I, § 13. This provision suggests that any taking, regulatory or otherwise, is unconstitutional under South Carolina law without first providing compensation, whereas the federal constitution envisions a taking for public use to be a constitutional act so long as just compensation is made afterwards but computed from the time of the taking.

crets); *Armstrong v. United States*, 364 U.S. 40, 44-46 (1960) (materialman's lien); and *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (support estate).

At other times, the right has been defined by the English common law. "Long before the original States adopted the Constitution, the common law protected an owner's right to decide how best to use his own property." *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 513 (1977) (Stevens, J., concurring) (right to dwell with the person of one's choice). *See also Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (the right to exclude others); *Curtin v. Benson*, 222 U.S. 78 (1911) (right to pasture livestock); *Chicago, B. & Q. R. Co. v. Illinois ex rel. Grimwood*, 26 S.Ct. 341, 348 (1906) (right to drain land into a riparian stream); *United States v. Welch*, 217 U.S. 333 (1910) (right-of-way); *Gardner v. Village of Newburgh*, 2 Johns. Ch. (N.Y.) 162 (1816) cited in *Pumpelly v. Greenbay Company*, 80 U.S. (13 Wall.) 166, 178 (1871)(right to receive waters from a riparian stream according to their natural flow); *Bostock v. Sams*, 52 A. 665, 668 (Md. 1902) (right to build on one's own land).

Thus, at common law, property is not so much the material thing, as the aggregate of rights which the law annexes to it. *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945).[6] This Court has affirmed the common law doctrine that certain strands among the bundle of rights are essential attributes of its ownership, without which property itself could not exist. Among these rights is the right to possess, use, and dispose of property, *United States v. General Motors Corp., supra*, as well as the right to exclude others from that use, *Nollan v. California Coastal Commission, supra*.

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[6] *See also Willcox v. Penn Mut. Life Ins. Co.*, 55 A.2d 521, 528 (Pa. 1947); *Wynehamer v. People*, 13 N.Y. (3 Kernan) 378, 433 (1856); and *Eaton v. B. C. & M. R. R.*, 51 N.H. 504, 511 (1872).

The right to use and enjoy property --the right affected in this case-- is an essential attribute of its ownership that may be traced back at least as far as Lord Coke who "long ago said, 'What is land but the uses thereof?'" *The People v. Kerr*, 37 Barb. (N.Y.) 357, 399 (1862). "From the very nature of these rights of user and of exclusion, it is evident that they cannot be materially abridged without, *ipso facto*, taking the owner's 'property'." *Burrows v. City of Keene*, 432 A.2d 15, 19 (N.H. 1981), *quoting Eaton v. B. C. & M. R. R.*, 51 N.H. 504, 511 (1872). There are, as this Court approvingly noted in *Pumpelly v. Greenbay Company*, 80 U.S. at 179 (1871) "numerous authorities to sustain the doctrine that a serious interruption to the *common and necessary use of property* may be . . . equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken." *Id.* (emphasis added). This may be true not only of governmental actions which physically interfere with the use of property,[7] but also of regulations which deprive the owner the use or value of property.[8]

Amici acknowledge that no bright-line test exists for

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[7] *See, e.g., Pumpelly v. Green Bay Company, supra; Eaton v. B. C. & M. R. R., supra; United States v. Welch*, 217 U.S. 333 (1910) (by flooding); *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914) (by railroad locomotive smoke); *United States v. Causby*, 328 U.S. 256 (1946) and *Griggs v. Allegheny County*, 369 U.S. 84 (1962) (airplane overflights); *Walters v. Baltimore & O.R.R.*, 88 A. 47 (Md. 1913) (by bridge abutment).

[8] *See Nollan, supra; Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922); see also Wynehamer v. People*, 13 N.Y. (3 Kernan) 378, 398 (1856): "When a law annihilates the value of property, and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretations, and certainly within the spirit of a constitutional provision intended expressly to shield private rights from the exercise of arbitrary power;" *Moale v. Baltimore*, 5 Md. 321-322: "[W]e regard the act of 1817, which denies to the proprietor the use of his land, as nothing short of an act of confiscation."

determining when a regulatory taking occurs; rather, this Court has traditionally engaged in a balancing test weighing the burdens on the property rights at risk with the public benefits the government wishes to advance.[9] But in order to weigh these interests properly, a court must know and appreciate the *nature* of the property interest at risk. While in some cases, the amount of property may indeed seem small, the nature of the right affected, e.g., the right to exclude, is a property right so fundamental that its slightest diminution constitutes a taking as in *Loretto* and *Kaiser Aetna*.

On the other side of the scale, the Court must examine the nature of the governmental interest to determine what weight to give it. Just because it is within the police power of the state to enact the law, the true purposes of the law must be examined rather than the label attached to it. Thus, rules primarily relating to health and safety are generally given more weight than broader concerns promoting the general public welfare such as one finds in aesthetic and open-space rules.

In this case, the Court must weigh the fundamental property right to build on one's own land on one side the

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[9] *See Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893) (the takings clause is designed to "prevent[ ] the public from loading upon one individual more than his just share of the burdens of government"); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (the question "at bottom" in a takings case is "upon whom the loss of the changes desired should fall"); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318-19 (1987) (takings clause is "'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'") (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 835 n.4 (1987) (the government cannot "single[ ] out" individuals "to bear the burden of [its] attempt to remedy" public problems) (also citing *Armstrong*, 364 U.S. at 49); *United States v. Riverside Bayview Homes, Inc.*, 747 U.S. 121, 127 n.4 (1985) (denial of a permit to fill wetlands by the Army Corps of Engineers may constitute a taking for which compensation is required); *Skaw v. United States*, 740 F.2d 932, 939 (Fed. Cir. 1984) (heart of takings inquiry is "whether the governmental action is no onerous as to constitute a Fifth Amendment taking").

scale with a general environmental protection law on the other. To assist it in this undertaking, this Court has developed several guidelines.

For example, this Court used a three-part test in *Connolly v. Pension Benefit Guaranty Benefit Corp.*, 475 U.S. 211, 224-25 (1986) to weigh the interests presented there:

> [W]e have eschewed the development of any set formula for identifying a "taking" forbidden by the Fifth Amendment, and have relied instead on ad hoc, factual inquiries into the circumstances of each particular case. . . . To aid in this determination, however, we have identified three factors which have "particular significance": (1) "the economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) *"the character of the governmental action."* [*quoting Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (other citations omitted) (emphasis added)].

See also Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 494-95 (1987) (reiterating factors). *Keystone* also referred to another formulation or test for deciding whether the burden on a property owner is so great that the law on its face constitutes a taking:

> [L]and use regulation can effect a taking if it "does not substantially advance legitimate state interest, . . . or denies an owner economically viable use of his land."

Keystone, 480 U.S. at 485 (*quoting Agins v. Tiburon*, 447 U.S. 255, 260 (1980), and *citing Penn Central*, 438 U.S. at 124). *See also Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1176 (Fed. Cir. 1991) (citing numerous cases).

Applying these factors to a continuum of land use restrictions has yielded some results about which one can

make some general, but certainly not conclusive observations. An actual invasion of the property by the government or by other individuals under authority of the government, usually has been to found to constitute a "taking" because of the "character of the governmental action" and the importance of the property right invaded, *i.e.*, the right to exclude others.[10] Zoning ordinances such as that in *Euclid* which restrict the right of the property owner to use his land for certain purposes fall in a grey area and may or may not implicate the Fifth Amendment depending upon the extent of the restriction, the right being asserted, and the reciprocal benefits bestowed on the property owner. Finally, police power regulations regulating uses of one's property that constitute public nuisances have been generally upheld, not because there is a nuisance exception to the Fifth Amendment, but that in the particular case, the benefit to the public in abating the nuisance has outweighed the burden imposed on the individual to cease exercising that particular use of the property. *See, e.g., Hadachek v. Sebastian*, 239 U.S. 394 (1915)(urban brickyard).

The lower court in this case analyzed the issues before it in light of four criteria: the three *Connolly* factors (economic impact, interference with investment backed expectations, and character of the governmental action) and "the nature of the State's interest in the regulation" *citing Keystone*. 404 U.S. at 899.[11] While the lower court did not dispute the fact that petitioner was denied all economically viable use of his land and simply end the case there, it went on to conclude there was no taking by

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[10] *See* notes 8 and 9, *supra*.

[11] Whether the three *Connolly* factors in an *"as applied"* case relate to the "economic viability" test enunciated in *Agins* for *facial* challenges, or are part of a broader balancing analysis, is largely irrelevant and need not be resolved by this Court. The South Carolina Supreme Court concluded that the two economic *Connolly* factors are automatically met if Lucas can show that he has suffered the greater harm posited in *Agins* (which he did), namely, that he has been deprived of "all economically viable use of his land." 404 S.E.2d at 900, n.3.

making three fundamental errors: (1) the lower court wrongly assumed that building a home on a residential lot is a public nuisance or akin to one; (2) the lower court, based upon its erroneous interpretation of this Court's decision in *Keystone* construing *Mugler*, wrongly believed that there was a "nuisance exception" to the Just Compensation Clause and did not weigh the burden that abating this alleged nuisance would have on the rights of the property owner; and (3) the lower court wrongly assumed that the "character of the governmental action" factor applies only in physical occupation cases and has no application in cases such as this one. *Amici* will in turn address each of these issues in this brief.[12]

II. JUST COMPENSATION MUST BE PAID TO A LANDOWNER WHENEVER THE GOVERNMENT DENIES THE OWNER AN IMPORTANT PROPERTY RIGHT REGARDLESS OF THE EXTENT OF THE

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[12] While the petitioner clearly satisfied the second prong of the *Agins* test by showing that he was deprived of the economically viable use of his property, he did not and need not have challenged the BMA on the alternative grounds stated in *Agins*, namely that the BMA failed to "substantially advance a legitimate governmental interests." However, that does not mean that Lucas or any other property owner could not succesfully challenge the BMA on those grounds. *But see Esposito v. South Carolina Coastal Council*, 939 F.2d 165, 169 (4th Cir. 1991).

The *Esposito* court dismissed this challenge simply because it found that there was the "essential nexus" referred to in *Nollan*, between the state's interest to preserve the beach and the means chosen. 939 F.2d at 169. Yet as the *Nollan* Court made clear, the nexus requirement is only the beginning of the inquiry. The proposed activity by the owner must also "substantially impede these purposes"; and even if that is demonstrated, a regulatory taking could still be found if the restriction "would interfere so drastically with the [property owner's] use of their property. . . ." *Nollan, 483 U.S.* at 836. *Cf. Loveladies Harbor v. United States*, 21 Cl. Ct. 153, 160 (1990), citing to an earlier opinion in the same case, *Loveladies Harbor v. United States*, 15 Cl. Ct. 381, 388-390 (1988) (requirement that property owner preserve wetlands on his property in natural state does not substantially advance legitimate state interest as a result of weighing c. the benefits and burdens inherent in that test).

ECONOMIC HARDSHIP SUCH DEPRIVATION CAUSES.

A. Petitioner's Plan To Build Homes On His Two Lots Does Not Constitute A Public Nuisance Because The Resultant Injury To The Public Interest Is The Necessary Consequence Of The Cautious And Prudent Exercise By Him Of His Acknowledged Right To Build On His Own Land.

1. "Harm" that is the necessary consequence of the cautious and prudent exercise of an acknowledged right does not constitute a public nuisance at common law.

The maxim *sic utere tuo ut alienum non laedas* (use your property so as not to injure others) cited by the court below, 404 S.E.2d at 899, is one well established at common law but simply begs the question as to what is an injury to others.[13] While damage that is remote (which seems to be the case here) never constitutes a public nuisance, not all proximate injuries constitute nuisances either. *Eaton v. B. C. & M. R. R.*, 51 N.H. 504, 527 (1872). The problem is in determining what constitutes a *legal* injury to another. *See Lasala v. Holbrook*, 4 Paige (N.Y.), 169 (1833).

The reasonable use by another person of the other person's own property, *Eaton v. B. C. & M. R. R.*, 51 N.H. 504, 527 (1872), or the "cautious and prudent exercise of a lawful right," *Rounds v. Mumford*, 2 R.I. 154, at 162 (1852), does not constitute a public nuisance. As was stated so eloquently a century ago in *Helfrich v. Catonsville Water Co.*:

[13] *See Black's Law Dictionary* at 1551 (1968) (4th ed. rev.)

> The reasonable and proper exercise of acknowledged right by one man, may and often does work annoyance and loss to another; but rights cannot be forfeited for this reason.

74 Md. 269, 276 (1891).

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) represents a classic application of this maxim. Echoing the common law maxim that, "The rights of the public in property are to be governed by the same rules of law as the rights of individuals,"[14] Justice Holmes, speaking for this Court, held that public agencies which had been so foolish as to acquire only surface rights to land supported by anthracite coal had no more right to the surface support, a distinct property right recognized under Pennsylvania law and owned by certain coal mines, than private individuals would when contracting under similar circumstances. 260 U.S. at 415.

While an exigency existed that warranted public intervention (certainly of much greater magnitude and immediacy than the gradual and speculative beach erosion in this case), the harm caused by the mining of anthracite coal beneath public schools and streets was the necessary consequence of the mine owners' exercise of its mineral and support rights which the Commonwealth of Pennsylvania had repeatedly acknowledged as valid. Having once sanctioned the severance of the support estate from the surface, the Commonwealth of Pennsylvania could not, without resorting to the power of eminent domain, frustrate the reasonable expectations thus engendered, even if their realization resulted necessarily in serious public harm.

Amici have no doubt that the State of South Carolina's interest in preserving its coastline is a legitimate one, and for the sake of argument, we can assume it so substantial

[14] *Rounds v. Mumford*, 2 R.I. at 162. *Cf. Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 415 ("The rights of the public in a street . . . are those that it has paid for.").

as the Commonwealth of Pennsylvania's interest once was in preventing mine subsidence beneath public streets or schools which had acquired only surface rights. Nonetheless, the Kohler Act in *Pennsylvania Coal* was held a taking because the "harm" caused in that case, whether to private persons or communities, was the necessary consequence of the mine owner's exercise of what had been repeatedly acknowledged by the Commonwealth of Pennsylvania to be the mine owner's rights.

In the case at bar, the State of South Carolina has permitted the creation of Mr. Lucas's two residential lots, and it has permitted Mr. Lucas to acquire them in public commerce with the reasonable expectation of constructing two residential dwellings thereupon. While the errors of private individuals or public officials "cannot estop the [State of South Carolina] from exercising its police power to abate activity akin to a public nuisance," *Keystone*, 480 U.S. at 488, it has clearly given rise to certain expectations sufficiently bound up with the notion of property that the State of South Carolina must condemn them and pay for them before it effectively ousts Mr. Lucas from the lots and takes over their management.

Even if a use of property interferes *substantially* with the rights of others, including the public, it will not be declared a common law nuisance if the injury is the necessary consequence of the only beneficial use of the property. *Snow v. Parsons*, 28 Vt. 459 (1856) (impairment of a mill by discharges from a tannery upstream) and *Prentice v. Geiger*, 74 N.Y. 341 (1878) (impairment of a mill by sawdust discharged from a sawmill upstream) are two water pollution cases which illustrate the interrelationship between "nuisance" and "reasonableness" at common law. The reasonableness of the use of a stream when not settled by custom is a question of fact for a jury. *Snow v. Parsons*, 28 Vt. at 462; *Prentice v. Geiger*, 74 N.Y. at 345-46.

Slight inconvenience must be tolerated by the other riparian owners if it affords great benefit to the one. However, if the use of a stream by one riparian owner "essentially impairs," *Snow v. Parsons*, 28 Vt. at 462, or "substantially interfere[s]," *Prentice v. Geiger*, 74 N.Y.

at 345, with the rights of others, the use will be held a nuisance, "*unless it is a thing altogether indispensable to any beneficial use at every point of the stream*," *Snow v. Parsons*, 28 Vt. at 462 (emphasis added). The rule of law in water pollution cases has been aptly stated by *Helfrich v. Catonsville Water Co.*, 71 Md. at 276: "[T]he owner of the land must not lose the beneficial use of it."[15]

While these examples are taken from water pollution cases because of the environmental features of the case at bar, the same common law principles would seem applicable to other classes of nuisances as well. Every activity which detracts from the public interest can in some sense be said to cause "harm" to the general public welfare.[16] However, not every "public harm," even a serious one, constitutes a public nuisance or justifies the destruction of constitutionally protected rights.[17] While this Court has

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[15]While some uses of property were considered more or less subject to regulation even to the point of extinction, other uses were deemed at common law to be "essential and necessary uses" and "attributes of ownership." Thus, while the use of water for the propelling of machinery was permitted so long as it did not substantially interfere with the rights of others, the use of water for domestic purposes, including the watering of livestock, was absolutely necessary, *Prentice v. Geiger*, 74 N.Y. at 345 (1878), and could not be prohibited even if it rendered the water unsuitable for use by a municipal water company incorporated downstream, *Helfrich v. Catonsville Water Co.*, *supra*.

[16]*See Florida Rock Industries, Inc. v. United States*, 791 F.2d 893, 904 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987) ("a moderate and *pro forma* polluter such as Florida Rock does no harm" in its mining operation in contrast to someone who puts toxic waste in drinking water).

[17]It should be clear that the maxim that a taking occurs if a land use regulation "denies an owner economically viable use of his land," *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), did not originate with zoning. It was rather, in its origins, a limitation upon the power of government to protect public health and safety. *See, e.g., Welch v. Swasey*, 214 U.S. 91, at 107 (1909) (height restriction justified based on the risk of fire could constitute a taking if it deprived the owner of the profitable use of the land). Rather, it was quickly *applied* to zoning by state courts relying upon this Court's ruling in

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frequently applied the maxim *sic utere tuo ut alienum non laedas* to "a misuse or illegal use" of property, it has never allowed this term to be applied to prevent "a legal and essential use, an attribute of its ownership," *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. at 512 (Rehnquist, C.J., dissenting).

2. The right to build a dwelling-house on an individual residential lot is a fundamental property right under common law.

In order for a court to properly weigh the competing private rights and public benefits as it must do even if a use is considered to be a nuisance-like activity (as *amici* will discuss in the following section), it is important to first assign an appropriate weight of the right asserted because not all property rights are of equal weight.

For example, Justice Holmes noted while still sitting on the Supreme Court of Massachusetts, that the right to erect a boundary fence more than 6 feet high for malicious purposes (so-called "spite fences") is more or less an accident of residential property ownership and can be limited. The right to build houses or stores for the same malicious purposes, however, is "an incident of property which cannot be taken away even by legislation." *Rideout v. Knox*, 148 Mass. 368, 372, 374 (1889).[18] Whereas the

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[17](...continued)
Nectow v. Cambridge, 277 U.S. 183 (1928) and *Pennsylvania Coal Co. v. Mahon*, *supra*. *See Eaton v. Sweeney*,177 N.E. 412 (N.Y. 1931); *Averne Bay Construction Co. v. Thatcher*, 15 N.E.2d 587, 591 (N.Y. 1938); and *Lipsitz v. Parr*, 164 Md. 222, 234 (1932).

[18] While a greater than 6-foot tall spite fence may be regulated, the erection of a 6-foot sea wall to protect one's beach property and home from the vicissitudes of nature (such as the kind used by the property owners in *Nollan*) is also an incident of property ownership, because at common law, the inherent and essential right of all men is the right of "acquiring, possessing, and *protecting* property. . . ." *Burrows v. City of Keene*, 432 A.2d 15, 19 (N.H. 1981)(emphasis added). Accordingly, while the issue is not directly presented in this case, (continued...)

manufacture of beer for consumption as a food is not a right which "inhere[s] in citizenship" as the owner tried to assert in *Mugler v. Kansas*, 123 U.S. 662, the right to cultivate the soil and to pasture one's livestock, *Curtin v. Benson*, *supra*, *Helfrich v. Catonsville Water Co.*, and more pertinently, the right to reasonably build houses or stores on one's own land, *Bostock v. Sams*, *supra*, *Rideout v. Knox*, *supra*, and the right to dwell with the person of one's choice, *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 514 (Stevens, J., concurring), are essential and necessary uses at common law and incidents of property ownership.[19]

The South Carolina Supreme Court seems to have interpreted the very general findings in the Beachfront Management Act as declaring Mr. Lucas's development plans to be a public nuisance, or at least as being closely enough akin to one as to justify the destruction of his property rights. 404 S.E.2d at 896-99. However, the findings of a legislative body are not always decisive. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 413. *Amici* submit that the construction or the rebuilding of a dwelling-house on an individual residential lot is not a public nuisance at common law, nor does it allow itself to be declared so by legislative enactment. As one court put it:

> Although there may undoubtedly be some uses of the land which are sufficiently injurious to others that their use may be prohibited, the normal

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[18](...continued)
certain provisions of South Carolina's BMA limiting the use of "armoring in the form of hard erosion control devices such as seawalls. . . to protect erosion-threatened structures [homes] adjacent to the beach," BMA, § 1(5), and the prohibition on the rebuilding of damaged homes are clearly suspect.

[19] *Compare Nollan v. California Coastal Commission*, 483 U.S. 833 n. 3: "But the right to build on one's own property . . . cannot remotely be described as a 'government benefit'."

development of the land for residential purposes is not one of them.

Burrows v. City of Keene, 432 A.2d 15, 21 (N.H. 1981).[20]

B. There Are No "Nuisance Exceptions" To The Operation Of The Just Compensation Clause.

The lower court erroneously concluded that if the legislative purpose of the BMA is to prevent a significant harm to South Carolina's beaches, however remote, then it need not proceed to weigh the burdens placed on the property owner. It did so by misintepreting Keystone's reliance on *Mugler* and its progeny as somehow relieving a court from weighing the private and public interests involved.

While the petitioner and perhaps other *amici* will treat this issue in some depth in their briefs, it is suffice to say here for purposes of our brief that the notion of a "nuisance exception," a rather unfortunate phrase used in the dissents in both *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 146 (1978) (Rehnquist, J., dissenting) and *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 513 (Rehnquist, C. J., dissenting), can be properly understood as simply being a short hand method of stating the end result that a court arrives at after weighing both the public benefits and the private burdens in cases involving those kind of activities. Even the majority in *Keystone* did not consider *Mugler* an exception to the operation of the Just Compensation Clause, but merely represented the added and *sometimes* decisive weight that should be placed on the public interest side of the scale.

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[20] No doubt Mr. Lucas's common law rights have been modified somewhat by this Court's ruling in *Ambler Realty Co. v. Euclid*, 272 U.S. 365 (1926). But Mr. Lucas's property is zoned for residential use, and the lots were created under the subdivision regulations of the State of South Carolina. While zoning laws are restrictions on the use of land, the zoning law here permitting residential use merely affirms the common law right already possessed by the petitioner.

Thus, it was not superfluous as the lower court suggests in this case, 404 S.E.2d at 901, n.4, for the *Keystone* majority to continue its analysis by weighing the private side of the equation by looking at the nature of the right asserted, the severity of the economic impact of the regulation, and the investment backed expectations. *Pennsylvania Coal* should in turn be distinguished from *Mugler* because the former resulted in a direct invasion of an acknowledged right: "'[T]he right to coal consists in the right to mine it.'" *Pennsylvania Coal*, 260 U.S. at 414, quoting *Commonwealth ex rel. Kealtor v. Clearview Coal Co.*, 100 A. at 820 (Pa. 1917).

In any event, the private rights and public benefits present in the so-called "nuisance" cases can easily be distinguished from those that must be weighed here. In light of this Court's decision in *Chicago, B. & Q. R. Co. v. Illinois*, decided after *Mugler*, this Court's decision in *Mugler* should not be interpreted as authorizing the State to "violate rights secured or guaranteed by [the Constitution of the United States]" whenever "providing, by legislation, for the protection of the public health, the public morals, or the public safety." *Mugler v. Kansas*, 123 U.S. at 663.[21] Rather, *Mugler* should be interpreted as holding that the right to manufacture intoxicating liquor is not one which "inhere[s] in citizenship." *Mugler v. Kansas*, 123 U.S. at 662.

Clearly, the fundamental right to build a home on one's property is significantly more weighty than the right to manufacture intoxicating beverages. Furthermore, the property owner in *Mugler*, unlike petitioner here, could still use his land for innumerable other lawful uses. Indeed, he could use his brewery equipment to manufacture non-alcoholic beer, or export the equipment and sell

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[21] Already, some 14 years before *Mugler*, this Court recognized within the context of a prohibition on the sale of intoxicating drinks, that a regulation validly enacted for the protection of the public health and safety could operate so rigidly upon property in existence at the time of its passage as to amount to a taking. *Bartemeyer v. State of Iowa*, 85 U.S. 129, 133 (1873), citing *Wynehamer v. People, 13 N.Y.* 378 (185[illegible]).

it to someone in a state that allows such activity. Mr. Lucas cannot move his beachfront lots, nor has he even been given any transferable development rights as was the property owner in *Penn Central*. *Amici* submit that these factors alone are sufficient to show that with respect to the private rights side of the equation, the burden on Lucas is considerably greater than that imposed on Mugler.

On the public interest side of the scale, the harm sought to be curtailed by the law in *Mugler* could be realized almost immediately upon the sale of the intoxicating beverage. In this case, on the other hand, no immediate harm or even foreseeable harm will be caused by Mr. Lucas building a home on his property. The harm caused to the beach is clearly remote and speculative and may even be able to be mitigated.[22]

The foregoing distinctions between *Mugler* and the instant case can be applied to virtually all the other so-called nuisance cases cited by the lower court. In all of them, the owner of the property can still retain the use his property for numerous other uses. Furthermore, the harm to the public occurs immediately by the operation of the offending activity, whether it be the operation of brickyard in the residential area (*Hadachek*), or almost immediately, such as the infected cedar trees that threatened more valuable apple orchards, *Miller v. Schoene*, 276 U.S. 272 (1928).

This Court's takings jurisprudence has always included a careful examination of the nature of the asserted right or interest invaded and a weighing of the public interest to

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[22]As previously noted, the BMA envisions a "gradual retreat from the [beach/dune] system over a forty-year period. . . ." BMA, § 2(2). As has been aptly noted:

> the Act's forty-year retreat scheme, rather than immediate destruction of all offending structures, is clear proof that the *Esposito* claimants' residences are not dire threats to public safety and welfare. A "public nuisance" ought to be abated, not phased out thrugh a half-lifetime of attribution.

Esposito v. South Carolina Coastal Council, 939 F.2d 165, 173 (4th Cir. 1991) (Hall, J., dissenting).

be protected. The lower court was derelict in thinking that there was a short-cut via a so-called "nuisance exception."

C. The Character of the Governmental Action In This Case Is Confiscatory In Nature Because It Effectively Ousts The Owner From His Property In A Way That Has Been Customarily Achieved Through Eminent Domain Proceedings.

As this Court has noted, another important factor to consider to determine whether a regulatory taking has occurred is the "character of the governmental action." *See Keystone*, 480 U.S. at 495 (1987). While the lower court noted that outright physical occupation of one's property satisfies this factor and is almost invariably determinative that a taking has occurred, 404 S.E.2d at 899 citing to *Loretto*, the court was wrong to think that the factor cannot be applied in land-use control cases such as this one where the law can be characterized as confiscatory.

At the far end of the spectrum is a physical invasion or confiscation of property for the benefit of the public. Such activities -- for example, the condemnation of property to build public roads or create parks -- clearly require compensation to be paid. The owner is ousted from his property.

The setback lines in the BMA similarly have the effect of ousting the owner from his property by extinguishing a fundamental attribute of ownership: the right reasonably to use the surface estate of one's own property. *See Agins*, 447 U.S. at 262, and *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (both referring to fundamental rights tied to property ownership). As previously discussed, the right to build on one's own property is a basic common law right reserved to the people. *Bostock v. Sams*, 52 A. 665, 668 (Md. 1902). *See also Nollan*, 483 U.S. at 834 n.2 ("[T]he right to build on one's own property . . . cannot remotely be described as a 'governmental benefit.'").

In contrast to the interests at stake in many Supreme Court cases addressing regulatory takings, *e.g.*, *Penn Central* (air rights) and *Keystone* (support or mineral estate), the BMA destroys Lucas' basic right to use the surface estate by building homes thereon. The Supreme Court has never concluded, and we believe could not conclude under its own precedents, that all reasonable use of the surface estate may be completely denied without compensation. While *amici* believe that *Keystone* was wrongly decided, the instant case is clearly distinguishable from the situation in *Keystone* where the mine owners could not even demonstrate that a single mine of theirs could not be profitably operated, and where, at best, only two percent of their coal might be affected. 480 U.S. at 496 (1987).

On the other hand, the setback lines in the BMA indisputably destroyed all economically viable use of petitioner's land and, in effect, converted the parcel into a park for the benefit of the public. While the formation of such a park may well be in the public interest, the government cannot indirectly accomplish through regulation what it would otherwise do through condemnation. *See Nollan*, 483 U.S. at 834, 841-42 (requiring grant of an easement would be a taking; improperly conditioning a building permit on such a grant is also a taking), and *City of Austin v. Teague*, 570 S.W.2d 389, 394 (Tex. 1978) (city could not preserve scenic easement through regulation rather than initial plan of acquisition).

Indeed, the purposes of the BMA are not all that dissimilar to the purposes of a floodplain ordinance declared invalid by a unanimous Supreme Court in *Morris County Land I. Co. v. Parsippany-Troy Hills Tp.*, 193 A.2d 232 (N.J. 1963) in which an oft-cited passage from *Averne Bay Construction Co. v. Thatcher*, 15 N.E.2d at 592 (1938), was quoted to the effect that:

> An ordinance which *permanently* so restricts the use of property that it cannot be used for any reasonable purpose goes, it is plain, beyond regulation, and must be recognized as a taking of the property. The only substantial difference, in such case, between restriction and actual taking, is that the restriction leaves the owner subject to the burden of payment of taxation, while outright confiscation would relieve him of that burden.

Morris County, *supra*, 193 A.2d at 242 (1963)(emphasis in original).

As was the case with *Morris County*, most of the contemplated uses under the BMA are of a public or *quasi*-public nature, and it may be argued that the "prime object of the [BMA] regulations is to retain the land substantially in its natural state." 193 A.2d at 239. *Cf. McDougal v. County of Imperial*, 942 F.2d. 668 (9th Cir.1991)(owner deprived of economically viable use of property by floodplain designation states a claim for inverse condemnation).

Similarly, a unanimous New Hampshire Supreme Court in *Burrows v. City of Keene*, 432 A.2d 15 (N.H. 1981) had no trouble finding that a zoning ordinance that placed a portion of the property owner's land in a undevelopable "conservation zone" constituted a taking. While that court cited to the usual balancing tests and the difficulty in some cases of deciding when a regulatory taking has occured, it easily concluded that the case before it "*does not lie anywhere near the line*" and held the ordinance to constitute a taking. *Id.* at 20 (emphasis added). Indeed, the *Burrows* Court went on to chastise public officials "who have no right or legitimate reason to attempt to spare the public the cost of improving the public condition by thrusting that expense upon an individual," *id.* at 20, and that inverse condemnation awards, even for a temporary taking, for confiscatory regulations such as the one in that case should "encourage such officials *to stay well on the constitutional side of the line* [*citing San Diego Gas & Elec. Co. v. City of San Diego*, 101 S.Ct.at 1308, n.26 (Brennan, J., dissenting)] and should also *discourage harassment of property owners* by repeated

amendments of zoning regulations and the enactment of new ones." 432 A.2d at 20 (emphasis added).[23]

These sentiments by the New Hampshire Supreme Court echo Justice Holmes often quoted statement that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 416 (1922). *Amici* submit that there is no meaningful distinction between the "conservation zones" in *Burrows* and *Morris County* and the beach/dune zone in the case at bar.

Not suprisingly, commentators and courts have agreed that the character of such a governmental action is confiscatory. *See* Rathkopf, 1 The Law of Zoning and Planning, §§ 6.07[6] at 6-48, 6-49 (1991), "Where land is zoned exclusively for public or quasi-public uses, such as a. . . park, public recreation area, or parking lot, courts are likely to hold the regulation confiscatory." (cases cited omitted). More pertinently, Rathkopf notes that

> a zoning or other type of land use regulation which totally prohibits any development or other reasonably beneficial use of the land is likely to be held confiscatory. For example, prohibiting all reasonable use by placing land in a conservation zone, preserving it as a wildlife refuge, or limiting its use to dune crossings and fences or to wooden walkways, wharfs, and duck blinds, will generally result in a finding of confiscation.

Id. § 6.07[7] at 6-51 (cases cited omitted).

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[23] While the BMA was recently amended to allow special permits to be issued, and Mr. Lucas may ultimately be successful in obtaining them for both lots, he is nevertheless entitled to just compensation for the temporary taking during the years since the enactment of the BMA. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). If he is given a permit for only one lot, he is entitled to the temporary taking of the one, and a permanent taking of the other.

Viewed as a 100 percent set-back ordinance, the BMA would similarly not survive judicial scrutiny. *See, e.g., Hoshour v. County of Contra Costa*, 21 Cal. Rptr. 714 (1962)(set-back reducing the useful area of triangular corner lot to 10 square feet is confiscatory); *Faucher v. Sherwood*, 32 N.W.2d 440 (Mich. 1948) (40 foot setback requirement of property only 58 feet wide); *Nectow v. Cambridge*, 277 U.S. 183 (1928)(*Euclid*-type ordinance invalidated that left the landowner with a 100-foot-wide residential strip wedged between a soap factory and Ford assembly plant, thus destroying all of the property's value with no reciprocal benefit).

The "character of the government action" can also be gauged by comparing it to the customary way in which the government obtains similar public benefits. For example, government authorities normally do not use their powers of eminent domain to maintain a pillar of coal in the ground (*Keystone*) or preserve superjacent air space (*Penn Central*). Nor does the government usually purchase brickyards (*Hadachek*) or other such noisome concerns in order to cease the operations of same. On the other hand, all levels of government employ eminent domain to purchase and create open space and public parks.[24]

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[24] Congress has explicitly provided for numerous funding mechanisms and State grant programs to acquire private lands to remain essentially in their natural state for the public benefit, be they wetlands, coastal areas, and other open space for parks, wildlife refuges, and the like. *See, e.g.*, Emergency Wetlands Resources Act of 1986, 16 U.S.C. §§ 3921-3923 (authorizing purchase of wetlands); The Recreation Use of Conservation Areas Act of 1962, as amended, 16 U.S.C. § 460K-1 (authorizes acquisition of areas adjacent to fish and wildlife areas for "protection of natural resources" and related "recreational development"); The Land and Water Conservation Fund Act of 1965, 16 U.S.C. § 4601-4-11 (authorizing purchase of land, waters, or interests in them); The National Wildlife Refuge System Administration Act, 26 U.S.C. § 668dd-33 (requires payment of fair market value for any right-of-way easement or reservation granted within the Refuge System); The Migratory Bird Conservation Act, as amended, 16 U.S.C. § 715 (authorizes Secretary of Interior to purchase migratory bird areas); Federal Land Policy and Management Act, 43 U.S.C. § 1748 (authorizes Secretary of Interior to purchase lands primarily of value for outdoor recreation purposes).

This Court should not allow South Carolina and other governmental bodies to conveniently avoid the customary route of compensating landowners whose property is put to public use. Indeed, it is only of recent vintage (and dwindling public fiscs) that governmental bodies have sought in the name of environmental protection to circumvent their eminent domain powers and take an individual's property via confiscatory regulations such as the one at bar. If South Carolina's argument prevails, one wonders whether it or any other level of government would ever pay private landowners to acquire wildlife refuges, wetlands, and parks, whether by the beach, in the suburbs, or in the middle of town.

Thus, the other two factors in *Connolly*, i.e, the extent to which a regulatory action interferes with the owner's investment-backed expectations and the economic impact on the property owner, are additional but not necessary criteria to determine if a taking occurred. A farmer, for example, may have a small parcel of land that lies fallow and thus may have no investment-backed expectations to use that portion of his property, nor would a loss of those few acres out of hundreds that he owns have any real economic impact on him. Nevertheless, a requirement that he keep those acres in a pristine state because they are wetlands or harbor endangered wildlife species rather than clear them for future farming use prevents him from ever making reasonable use of his property and is confiscatory by its very nature.

Similarly, the owner of a residential lot has the right to build and maintain his home on his property, a denial of which will constitute a taking even without a frustration of investment-backed expectations or a significant economic impact. In *Loretto*, the economic use of the apartment building could be maintained, or indeed, might even have been enhanced by the cable television wires affixed to the building, yet the property right invaded -- the right to exclude others-- was an important enough one to trump the alleged public benefits. The same right to exclude others was found paramount in *Kaiser*. And in *Moore v. City of East Cleveland*, the owner of the house could still live in it, was not frustrated by any investment-backed

expectations, nor experienced a decrease in the value of the house, but the zoning regulation infringed on an important right of the owner to decide whom she could live with, in that case her grandchildren, and thus was viewed as a taking of her property rights entitling her to just compensation. 431 U.S. at 513 (1977) (Stevens, J., concurring).

In the case at bar, the fundamental common law right is the enjoyment of the lateral use of the surface estate for the building of one's home. To be sure, in this case as in many others, the confiscatory nature of the regulation is compounded by the economic impact of the law and its frustration of the owner's investment backed expectations, but those economic criteria are not determinative.[25]

---

[25] Thus, the date the property is acquired as compared to the initiation of the regulatory program is irrelevant. In *Nollan*, this Court said:

> Nor are the Nollans' rights altered because they acquired the land well after the [Coastal] Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.

483 U.S. at 834, n.2. Thus, Mr. Lucas could give or bequeth his property rights in the two lots to anyone he chooses. The recipient's property rights could not be diminished simply because the recipient had no investment-backed expectations having invested nothing in the lots. Nevertheless, the confiscatory nature of the regulation works a taking on the new owner justifying compensation based on the fair market value without the setback restrictions. Thus, even assuming that the new owner could, for example, charge beachgoers $50 a day for the right to use the property during the season or could use the property to rent beach umbrellas, and thus can be said to enjoy an economically viable use of the property, the BMA would nevertheless constitute a taking because it deprives the owner of the basic right to build a home on his property. Similarly, Mr. Lucas' rights in the property would be the same regardless of whether he had originally acquired the property as a gift, paid one dollar for it, or one million dollars.

CONCLUSION

The maxim that "a man's home is his castle" is one deeply embedded in our heritage. The State of South Carolina, however, believes that Mr. Lucas should be contented with making his castle out of sand. This Court should emphatically tell the government authorities otherwise.

Respectfully submitted.

Daniel J. Popeo
Paul D. Kamenar
(Counsel of Record)
Washington Legal Foundation
1705 N Street, N.W.
Washington, D.C. 20036
(202) 857-0240

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On Writ of Certiorari to The Supreme Court of the State of South Carolina

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BRIEF OF SOUTH CAROLINA POLICY COUNCIL EDUCATION FOUNDATION AND GEORGIA PUBLIC POLICY FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

G. Stephen Parker*
Deborah A. Ausburn
Southeastern Legal Foundation, Inc.
2900 Chamblee-Tucker Rd., Bldg. 4
Atlanta, Georgia 30341
(404) 458-8313

Attorneys for *Amici Curiae*

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Attorneys for *Amici Curiae*

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* Counsel of Record

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INTEREST OF AMICI

The South Carolina Policy Council Education Foundation ("South Carolina Policy Council") and Georgia Public Policy Foundation ("Georgia Policy Foundation") submit their brief as *amici curiae* in this case. The parties have consented to the filing of this brief, and their consent letters have been filed with the Clerk of this Court.

The South Carolina Policy Council and Georgia Policy Foundation are non-profit research and education foundations. Their members include more than 500 citizens of South Carolina and Georgia, including numerous current or former U.S. and state legislators, local elected officials, and the executive officers of

more than one hundred small businesses, corporations, and trade associations operating within their respective states.

The South Carolina Policy Council and Georgia Policy Foundation are organized for the purpose of advancing public interest viewpoints on legal and public policy questions of significant concern to the people of South Carolina and Georgia. Their members believe that the well-being and future hopes of our nation are best advanced by public policies that spur economic growth, enhance individual opportunity, empower citizens, and defend traditional economic principles and social values. In recognition of this, the two organizations include in their areas of concern the government's treatment of private property and other civil rights.

STATEMENT OF THE CASE

Amici South Carolina Policy Council and Georgia Policy Foundation adopt the statement of the case contained in the brief of the Petitioner.

SUMMARY OF ARGUMENT

The standard established by the Supreme Court of South Carolina allows the state to declare a traditional, basic use of property, and hence almost any use, a "serious public harm," even though the state is not prohibiting that use elsewhere. By using the "serious public harm" label, the State of South Carolina can avoid compensating private property owners for any taking of their property.

Furthermore, the State's claim that it is protecting the public is erroneous. South Carolina is not protecting its citizens from a classic harm, but actually is conferring a benefit on them. If the state wishes to confer those benefits, it has the power to do so, but it should place the cost on the citizens benefited, not the person who invested in the property.

Finally, the protection of property rights was at the core of the purposes for which our government was formed, and property rights should be given the same protection as all other civil rights.

ARGUMENT

I.

THE SOUTH CAROLINA SUPREME COURT'S RELIANCE ON A NUISANCE THEORY CREATES AN ERRATIC STANDARD INCAPABLE OF PROTECTING INDIVIDUAL CIVIL RIGHTS.

David Lucas spent almost $1 million on 2 beachfront lots on which he planned to build houses. He did not seek to discharge pollutants, dredge sand from the seashore, or even operate a business. He planned to use the lots for the simple purpose for which they had been appraised, for which real property throughout time has been employed, and, in fact, for which beachfront lots adjoining his have been used for years.

Almost two years later, the South Carolina legislature passed a coastal protection law that, in effect, prohibited Mr. Lucas from constructing any buildings on his property. The law wiped out Mr. Lucas's investment. Nevertheless, the Supreme Court of South Carolina held that he was not entitled to compensation because "when a State merely regulates use, and acts to prevent a serious public *harm*, there is no 'taking' for which compensation is due." *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 900 (S.C. 1991), *cert. granted*, 112 S.Ct. 436 (1991) (emphasis in original).

This holding is troublesome for two reasons. First, the simple act of building a house has never been considered a

"serious public harm," and South Carolina's statutory scheme does not treat it as such. Second, the court creates an open-ended test by which a government can avoid compensating citizens simply by giving its activities the correct label.

Building a home, which was the proposed, and originally appraised, use of the lots, is hardly the "nuisance-like conduct" that this Court has held to be beyond the protection of the Fifth Amendment. *See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) (prohibiting mining that might cause subsidence); *James Everard's Breweries v. Day*, 265 U.S. 545 (1924) (prohibiting sale of malt liquors even for medicinal purposes); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (prohibiting brickyards in residential area).

Building a home on one's own land is one of the most basic uses of property, and one of the most fundamental rights of property ownership. *Cf., Nollan v. California Coastal Commission*, 483 U.S. 825, 833 n.2 (1987) ("the right to build on one's own property--even though its exercise can be subjected to legitimate permitting requirements--cannot remotely be described as a 'government benefit'"). Building a home is hardly "unreasonable use of . . . one's own property, to the detriment, hurt, annoyance, discomfort, injury, or damage of another." Joyce, *Nuisance* § 11 (1906).

Nor does the statutory scheme treat beachfront development in itself as a classic nuisance. The legislative findings recite great harm that the government believes has resulted from past construction on the beaches:

> (4) . . . Consequently without adequate controls, development unwisely has been sited too close to the system. This type of development has jeopardized the stability of the beach/dune system,

accelerated erosion, and endangered adjacent property. It is in both the public and private interests to protect the system from this unwise development.

(5) The use of armoring in the form of hard erosion control devices such as seawalls, bulkheads, and rip-rap to protect erosion-threatened structures adjacent to the beach has not proven effective. These armoring devices have given a false sense of security to beachfront property owners. In reality, these hard structures, in many instances, have increased the vulnerability of beachfront property to damage from wind and waves while contributing to the deterioration and loss of the dry sand beach which is so important to the tourism industry.

S.C. Code Ann. § 48-39-250 (1990 Supp).

The statutory scheme proceeds to address these harms of *past* construction by prohibiting *future* construction. S.C. Code Ann. § 48-39-290 (A) (1990 Supp). *Existing* structures (which according to the legislature caused all of the existing harm) may be replaced, *id.*, § -290 (B)(1)(b)(iv) & (v); repaired, *id.*, § -290 (B)(1)(b)(i); and even expanded, *id.*, § -290 (B)(1)(b)(ii).

The legislative findings do not explain why future construction on the beaches of South Carolina poses more of a threat to the environment than do existing structures. Indeed, insofar as the harm that the legislature wishes to prevent, there is no principled difference between proposed and existing buildings. The best way to preserve the coastline no doubt would be to raze the existing dwellings, or at least prevent them from being repaired or replaced.

The South Carolina legislature no doubt had powerful reasons for choosing not to require its constituents to destroy their homes. Yet those reasons are not sufficient to transform proposed construction into a nuisance, or to make the damage to Mr. Lucas' property any less a taking than would be the destruction of an already existing building.

The South Carolina legislature, then, is not treating coastal construction as a true "nuisance-like activity." Rather, it is making arbitrary and politically convenient distinctions between property owners. It is this placing of disparate burdens that the Fifth Amendment was designed to prevent. The taking doctrine

> prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.

Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893). *See also, Nollan v. California Coastal Commission*, 483 U.S. 825, 835 n. 4 (1987) ("If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the state's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause").

The specter of thousands of families being required to destroy their homes in order to protect the environment illustrates the danger of the test that the South Carolina court has established, and is not as far-fetched as one might hope. Numerous owners of homes in Massachusetts that were destroyed by a hurricane this past summer have been told that they may not rebuild their homes

because of environmental regulations. *Insight on the News*, December 2, 1991, at 29. The justification that the state has given is "safety and health" and prevention of public harm. *Id.*

It is not clear whether Massachusetts has decided that the affected homeowners are entitled to compensation. It is clear, however, that under the South Carolina court's formulation, the property owners would receive nothing. If the state decides that rebuilding a home would be a "threat to the public", then the homeowners need not be compensated. No doubt, the property owners can comfort themselves with the thought that their homelessness is actually a service to their community.

The danger in this case stems from the South Carolina court's uncritical deference to the legislature's good intentions. There is no reason to believe that the legislature was motivated by anything other than a desire to help the public, but good intentions are not an adequate protection against abuse of power. As Justice Holmes once noted, "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent." *Olmstead v. United States*, 277 U.S. 438, 479 (1928).

It is never difficult for a government to find noble motives for its actions. Most infringements on personal liberty are prompted by quite reasonable, even laudable, impulses. *See, e.g., Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 60 U.S.L.W. 4029 (U.S. Dec. 10, 1991) (state's desire to compensate crime victims was laudable, but its efforts violated the first amendment); *Minnick v. Mississippi*, ____ U.S. ____, 111 S.Ct. 486 (1990) (right to counsel during police interrogation); *City of Richmond v. J.A. Croson Co.*, ____ U.S. ____, 109 S.Ct. 706 (1989) (city's effort to remedy past discrimination was nevertheless a violation of the equal protection

clause). The essence of constitutional protection is a declaration that, no matter how high-minded the goal, there are some things that a government simply may not do.

This is particularly true in relation to the just compensation clause. "The police power cannot be interpreted as an unrestricted grant of state power to act in the public interest, for then the exception will overwhelm the clause." Epstein, *Takings: Private Property and the Power of Eminent Domain* 109 (1985).

That prediction has come true in this case. The South Carolina high court has so broadly interpreted the police power as to allow the legislature to nullify the just compensation clause. If the South Carolina government truly wishes to benefit its citizens, it can call on those citizens to bear the cost. What it cannot do is suddenly decree that a fundamental, long-recognized use of property is now a "nuisance," differentiate between people who perpetuate the supposed nuisance, and then try to justify itself by claiming good intentions.

II.

ALTHOUGH SOUTH CAROLINA HAS THE POLICE POWER TO PROHIBIT COASTAL CONSTRUCTION, THE STATE SHOULD REQUIRE THE GENERAL PUBLIC RATHER THAN PRIVATE INDIVIDUALS TO FINANCE THOSE RESTRICTIONS.

The issue in this case is not whether South Carolina can pass legislation to protect the environment. Certainly it is within a state's power to protect its natural resources. The question is

who must pay for that protection. The essence of the prohibition against taking property without just compensation is that the government may not force "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The South Carolina Beachfront Management Act imposes just such a burden.

The first reason for placing the financial burden of the statute on the state's taxpayers is that the law does not so much prevent a burden on the public as confer a benefit. There can be no doubt that environmental issues concern the public at large, and that laws designed to protect the environment benefit the public. Funding an affirmative benefit, however, is not the sort of burden that a government legitimately may impose on its citizens.

The Beachfront Management Act is different from such traditional environmental laws as prevention of pollution, 33 U.S.C.A. § 1251, *et seq.* (1986) (Clean Water Act), or protection of endangered species, 16 U.S.C.A. § 1531, *et seq.* (1985) (Endangered Species Act). As explained above, building a dwelling is not an activity normally considered to harm the public. Certainly, South Carolina does not consider the structures already built to be harmful. Rather, the state is placing an affirmative burden on Mr. Lucas, and requiring that he use his property to *benefit* his neighbors, many of whom are enjoying on their properties the activity that he is forbidden.

This beneficial nature of the statutes can be seen in several aspects of the program. First, as discussed already, the statute does not prohibit all activity that it links to environmental harm. Those people currently damaging the beach through their structures need not cease that damage. Only certain people, like Mr. Lucas, need bear the burden of "protecting" the coast.

Furthermore, the statute is designed to do more than protect the environment. One of the major concerns of the legislative findings is the "tourism industry that generates approximately two-thirds of South Carolina's annual tourism industry revenue which constitutes a significant portion of the state's economy." S.C. Code Ann. § 48-39-250 (1)(b) (1990 Supp). The prohibited erosion control devices have contributed "to the deterioration and loss of the dry sand beach which is so important to the tourism industry." S.C. Code Ann. § 48-39-250 (5) (1990 Supp). One of the state's goals is to preserve "dry sand beaches which provide recreation and a major source of state and local business revenue." S.C. Code Ann. § 48-39-269 (1)(b) (1990 Supp).

This concern with maximizing economic benefits for a particular industry fits squarely within the category that Professor Joseph Sax has described as the "enterprise function" of government. Sax, *Takings and the Police Power*, 74 Yale L. J. 36 (1964). Such activities serve to promote the public welfare, not protect it from harm, and as such are compensable takings.

The District Court of Appeal of Florida noted this distinction between preventing a harm and conferring a benefit in *State Dept. of Agriculture & Consumer Servs. v. Mid-Florida Growers, Inc.*, 505 So.2d 592 (Fla. Dist. Ct. App. 1987), *approved*, 521 So.2d 101 (Fla. 1988), *cert. denied*, 488 U.S. 870 (1988). The State of Florida had required a citrus nursery to destroy some of its stock. Although the citrus budwood to be destroyed was healthy, the plaintiff had bought it from another nursery where the state discovered citrus canker. After the state burned the trees, the nursery sued for compensation.

The District Court of Appeal held that the state's action, which it termed "a valid exercise of police power," caused a taking of property. *Id.* at 595. The court made a distinction between

destroying diseased property, which is "a source of public danger," *id.*, and destroying healthy stock "to protect public health, safety or welfare." *Id.* The court noted the danger of citrus canker, and the difficulty in determining whether healthy trees carried the disease. The court concluded:

> Destruction of the healthy trees, however, assured the continued vitality of Florida's most valuable citrus industry. Because destruction of the healthy trees benefitted the entire citrus industry and, in turn, Florida's economy, the cost is more properly spread among the many rather than the few who were unfortunate enough to have purchased budsticks from the infected nursery.

Id. at 595-96. The Florida Supreme Court approved this reasoning, noting its view that "if a regulation creates a public benefit it is more likely to be a taking." *Mid-Florida Growers, Inc.*, 521 So.2d at 103.

The house that Mr. Lucas proposes to build is analogous to the healthy trees in *Mid-Florida Growers, Inc.* The house itself would not be dangerous, and would not discharge noxious substances onto anyone else's property. The state wants to restrain Mr. Lucas simply because it wants to confer a benefit on the shoreline, the tourism industry, and South Carolina's economy.

Admittedly, the distinction between preventing a harm and conferring a benefit is not always a clear one. The principle, however, does have strong roots in our law. For example, tort law long has distinguished between the duty to refrain from harming someone, and the duty to affirmatively help them. *Cf.*, *Miles v. Melrose*, 882 F.2d 976, 992 (5th Cir. 1989) (noting differing duties placed on person controlling machinery and a bystander merely observing the danger), *aff'd on other grounds, sub nom, Miles v. Apex Marine Corp.*, ___ U.S. ___, 111 S.Ct. 317 (1990).

The distinction between harm and benefit, as fuzzy as it is, certainly offers more clarity than the current state of takings law. As one commentator has noted, "[A]t the present time the harm-benefit test offers the best hope, despite all the difficulties of its application, of making sense out of the cases." Tarlock, *Regulatory Takings*, 60 Chi.-Kent L. Rev. 23, 37 (1984).

A second reason for placing the financial burden of the Beachfront Management Act on the state is that when the public receives a benefit from an individual, the public should pay for it. State governments currently face various budget crises and taxpayer dissatisfaction. If citizens do wish to protect the environment, however, they will be willing to bear the cost. It is not the proper function of state government to paternalistically decide that a program is good for the public, and then hide the cost by imposing it on a small group of citizens. A government that possesses the coercive power to raise money can hardly claim that its individual citizens are better able to fund programs that the government deems desirable.

It is no accident that many states enacted coastal protection acts after Congress authorized federal funds for such programs. Coastal Zone Management Act of 1972, Pub. L. No. 92-583, 86 Stat. 1280, *codified as amended*, 16 U.S.C.A. §§ 1451-1464 (1988). *See also*, Zalkin, *Shifting Sands and Shifting Doctrines: The Supreme Court's Changing Takings Doctrine and South Carolina's Coastal Zone Statute*, 79 Cal. L. Rev. 205, 216-18 (1991) (listing states that have enacted coastal protection laws). It seems hardly fair for a government to establish such a program using another group's funds, and then face no liability for its decisions.

Finally, requiring the state to pay compensation serves the very important function of deterring legislatures from experimenting at the expense of others. "When municipal officials are able to deflect the costs of a public measure to those who lack the right to vote in municipal elections (or who are vastly outnumbered at the polls), a rule requiring compensation by shifting the costs back to the electoral majority, may help induce these officials to weigh more accurately the costs and benefits of alternative measures." Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 Yale L. J. 385, 420 (1977).

All too often, legislatures decide on a particular program for reasons only distantly related to the public good. At other times, a legislature will sincerely intend to benefit the public, but, as this nation discovered during Prohibition, the laws will miss their mark. It is always easier to gamble with someone else's money than with your own.

If the government of South Carolina is convinced that prohibiting future construction is necessary to protect its coastline and tourism industry, and that that goal is an important one, then it should back its plan with its own money. If the state does not believe in a program enough to put it in the budget, then it should not put it in the statute books.

In this case, the State of South Carolina has chosen to reap the benefits of "complete dominion and control over the surface of [Mr. Lucas'] land," *United States v. Causby*, 328 U.S. 256, 262 (1946), without bearing any of the resulting responsibility. South Carolina has in effect forced Mr. Lucas to make a $1 million donation to the coastline protection and tourism industry in that state.

If Mr. Lucas had invested his money in a savings account and the state appropriated it, the law would call that theft,

regardless of the state's motives. The fact that Mr. Lucas invested his money in land instead of a bank does not give the state any greater right to high-handedly wipe out his investment. This Court's description of the government's taking in *Armstrong v. United States*, 364 U.S. 40 (1960), applies equally to this case:

> The total destruction by the Government of all value of [this property] has every possible element of a Fifth Amendment "taking" and is not a mere "consequential incident" of a valid regulatory measure. Before the [property value was] destroyed, [Mr. Lucas] admittedly had compensable property. Immediately afterwards, [he] had none. This was not because [his] property vanished into thin air. It was because the Government for its own advantage destroyed the value of the [property] . . . . .

Id. at 48.

As in *Armstrong*, if the government believes it advantageous to destroy the value of Mr. Lucas's property, then the government should pay for that advantage.

III.

PROPERTY RIGHTS SHOULD BE PROTECTED AS STRINGENTLY AS OTHER CIVIL RIGHTS.

In the final analysis, this Court must determine what place property rights have in the constitutional hierarchy. The right to just compensation is part of the Fifth Amendment, which also provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . . .

U.S. Constitution, Amend. V.

This Court has built strong protections around such Fifth Amendment rights as the prohibition against self-incrimination and double jeopardy. If the State of South Carolina were to claim that, because of budget constraints, it could no longer provide for grand jury indictments of those accused of environmental crimes, federal courts would be swift to announce that neither an admirable concern for the environment nor the realities of fiscal problems would justify deprivation of such a basic right. The response would be similar to infringements on other rights, such as free speech or the right to counsel, no matter how loudly the state

proclaimed its desire to protect the environment.

Yet, the South Carolina court has allowed the state to deprive a man of his property in the name of environmentalism and tourism. This decision short-changes one of our basic personal liberties. Property rights are certainly as important as every other civil right, and should be treated as such.

In fact, property well may be considered the foundation for the other civil rights that we enjoy. John Locke, whose writings influenced the leaders of the American Revolution and the framers of the Constitution more than any other single philosopher, described the preservation of property as "the end of government, and that for which men enter into society." John Locke, *Of Civil Government* ¶ 138, quoted in Epstein, *Takings: Private Property and the Power of Eminent Domain* 14 (1985). Locke even went so far as to say, "Lives, Liberties, and Estates, which I call by the general Name, *Property*." Locke, *The Second Treatise of Government* § 123 (revised ed. P. Laslett ed. 1965) (emphasis in original).

Locke's view found its way into both the English common law and the Enlightenment that generated our government. Private property and a free society were "so intimately connected as to be all but equivalent." Pilon, *Property Rights, Takings, and a Free Society*, 6 Harv. J. L. & Pub. Pol. 165, 168 (1983).

This Court has recognized the interplay between property rights and other civil rights. "The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right, whether the 'property' in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other." *Lynch v. Household Finance*

Corp., 405 U.S. 538, 552 (1972).

Like other civil rights, property rights include the authority to dominion and use as one sees fit. "There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." W. Blackstone, *Commentaries* 2 (1765). Those rights of dominion, however, always have been limited by "the laws of the land," *id.*, to the extent that those laws are legitimate.

Government exercise of power, in a representative government, is legitimate only so long as it is compatible with the source of its authority -- the individuals whom the government rules. As Locke expressed it, a legislature is "but the joint power of every member of the society given up to that person or assembly." Locke, *Of Civil Government* ¶ 19 (1690), *quoted in* Epstein, *Takings* at 12. Thus, a government has no more power than individuals can transfer to it.

For example, government has the right to punish thieves because its citizens have transferred that right. No individual, however, has the right to be a thief; therefore, the government has no right to "take away from any man any part of his property without his consent." *Id.*

Eminent domain is an exception to that general principle. When the state takes private property for public use, it is a forced transaction, pure and simple. It cannot be justified under any of the traditional powers of government. A person whose property is taken is rarely harming others; he is simply enjoying property that, because of location or other factors, the government happens to want.

The only justification for eminent domain is that of necessity. Because of the circumstances in a given case, society will cease to function in one respect or another if a given individual does not yield his rights in his property. "All private property is held subject to the necessities of government. The right of eminent domain underlies all such rights of property." *United States v. Lynah*, 188 U.S. 445, 465 (1903).

Thus, the state, acting on behalf of the majority, can override the rights of a minority. In those exceptional cases, however, such raw exercises of power are made palatable only by just compensation from the majority to the minority for the lost rights:

> The government may take personal or real property whenever its necessities, or the exigencies of the occasion, demand. So, the contention that the government had a paramount right to appropriate this property may be conceded, but the Constitution in the 5th Amendment guarantees that when this governmental right of appropriation--this asserted paramount right--is exercised it shall be attended by compensation.

Id.

The only way to take property without compensation is to change the terms of the equation--for example, to deny that what the person held was "property," *e.g.*, *Beckwith v. Webb's Fabulous Pharmacies, Inc.*, 374 So.2d 951 (Fla. 1979) (state could appropriate interest on money deposited in interpleader fund because such interest was public money, not private property), *rev'd*, 449 U.S. 155 (1980). In this case, there can be no doubt that what Mr. Lucas held was private property. What the South Carolina government has attempted to do is change other terms of

the equation--to deny that Mr. Lucas actually has rights in that property.

The state legislature decided that "the economic and social improvement of the coastal zone and of all the people of the State," S.C. Ann. § 48-39-30 (A), requires overriding Mr. Lucas's traditionally-recognized rights in his property. Essentially, South Carolina has taken away from Mr. Lucas the rights to enjoy his property, and transferred those rights to tourists and sightseers. The fact that the state has left title to the land with Mr. Lucas is irrelevant. "While the government does not directly proceed to appropriate the title, yet it takes away the use and value; when that is done it is of little consequence in whom the fee may be vested." *United States v. Lynah*, 188 U.S. 445, 470 (1903).

Although the state certainly has the power to transfer those rights, it does not have the right to do so, at least in a representative system of government. Mr. Lucas has done and proposes to do nothing that will harm his neighbors. He has done nothing to otherwise forfeit his rights to the enjoyment of his property. The state simply has decided that it prefers to grant his rights to other people. In short, the state has appropriated Mr. Lucas's past efforts and investment decisions, and is using him for its own ends. *See, e.g.*, Pilon, *supra* p. 14, at 175-178. That process simply is not compatible with a society that values individual liberties.

This case falls within the outlines of the classic eminent domain situation. The state wants control over Mr. Lucas' property not because of what he wants to do with it, but because of where the property is located. Mr. Lucas' proposed use of his property would not harm others, unless in an indirect way that is currently permitted to thousands of his fellow citizens. Rather, the state simply has decided that it wants Mr. Lucas to use his

beachfront property in a certain way.

Perhaps the state is correct in its belief that it is acting out of necessity. Even necessity, however, can be justified only if Mr. Lucas receives an adequate substitute for his property rights. Otherwise, this case is nothing more than a raw exercise of government power without even lip service to the individual rights that have been one of this country's most valued contributions to the world.

This case presents this Court with the opportunity to declare whether property rights have equal stature with all other constitutional rights, or whether they are simply an interesting nostalgic footnote. The interpretation of the Supreme Court of South Carolina, if it stands, will relegate traditional property rights to the pages of history books, where they will become merely a backdrop for the state's power to legislate without liability.

CONCLUSION

For all of the foregoing reasons, *amici* respectfully request that this Court reverse the decision of the Supreme Court of the State of South Carolina.

Respectfully Submitted,

G. Stephen Parker,
Counsel of Record
Deborah A. Ausburn

Southeastern Legal Foundation, Inc.
2900 Chamblee-Tucker Rd., Bldg. 4
Atlanta, GA 30341
(404) 458-8313

Attorneys for *Amici Curiae*

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In The

Supreme Court of the United States

October Term, 1991

DAVID H. LUCAS,

Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

On *Writ* of *Certiorari* To The
Supreme Court Of The State Of South Carolina

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION AND THE NATIONAL CATTLEMEN'S ASSOCIATION IN SUPPORT OF PETITIONER

WILLIAM PERRY PENDLEY*
JOHN G. NELSON
TODD S. WELCH
MOUNTAIN STATES LEGAL FOUNDATION
1660 Lincoln Street, Suite 2300
Denver, Colorado 80264
Telephone: (303) 861-0244

*Counsel of Record

Attorneys for *Amici Curiae*

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* ON BEHALF OF MOUNTAIN STATES LEGAL FOUNDATION AND THE NATIONAL CATTLEMEN'S ASSOCIATION

Mountain States Legal Foundation (MSLF) respectfully petitions to file the annexed brief *amici curiae* pursuant to Supreme Court Rule 37. *Amici* have obtained the written consent of Petitioner which has been provided to the Clerk of the Court under separate cover. Respondent has declined to give consent.

Mountain States Legal Foundation is a nonprofit, membership, public interest law foundation organized

pursuant to the laws of the State of Colorado and dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited government, and the free enterprise system.

MSLF members include businesses and individuals who live and work in nearly every state in the country, including South Carolina. A large number of MSLF's members work in businesses involved in the utilization and development of natural resources and, as a result, are actively involved in environmental and property rights issues.

MSLF has participated in numerous cases before this Honorable Court both as an *amicus* and as attorney for one of the parties or an intervenor, most recently in *Lujan v. National Wildlife Federation*, 497 U.S. ___, 111 L.Ed.2d 695 (1990) and *Mountain States Legal Foundation v. National Wildlife Federation*, 497 U.S. ___, 111 L.Ed.2d 775 (1990).

The National Cattlemen's Association (NCA) is national spokesman for all segments of the nation's beef cattle industry – including cattle breeders, producers and feeders. This non-profit trade association was officially formed on September 1, 1977, through consolidation of the American National Cattlemen's Association (founded in 1898) and the National Livestock Feeders Association (founded in 1940). NCA represents 300,000 cattlemen throughout the United States. NCA membership includes

40,000 individual members, 47 affiliated state cattle associations and 32 affiliated national beef breeder organizations.

NCA provides the beef cattle industry with an organization through which its members function collectively to advance the economic, political and social interests of the U.S. cattle industry and to work toward solution of industry problems in the national economy. NCA's principal services are to manage industry issues, to influence government, to influence public opinion, to provide information and to serve as spokesman for the industry.

Both Mountain States Legal Foundation and the National Cattlemen's Association and their members are greatly concerned with the erosion of private property rights taking place in the name of "environmental protection." Whether the objective is the preservation of so-called "wetlands" or the protection of "threatened" or "endangered" species, the burden for such social, political and public benefit is placed upon private individuals and the lands which they own.

It is the members of Mountain States Legal Foundation and the National Cattlemen's Association who are asked to absorb the costs of the public use of their land, contrary, assert *amici*, to the Fifth Amendment to the Constitution. While Petitioner certainly speaks to the cost to him personally of the actions by the South Carolina Coastal Council and while Respondent speaks to its views as a governmental entity, neither can speak to the national significance and importance of the instant case.

MSLF and NCA, speaking on behalf of more than a quarter of a million Americans, address these issues. The views presented by MSLF and NCA will further aid this Honorable Court in deciding the instant matter.

For the foregoing reasons, Mountain States Legal Foundation and the National Cattlemen's Association request that this motion to file the annexed brief of *amici curiae* be granted.

DATED: January 2, 1992.

Respectfully submitted,

WILLIAM PERRY PENDLEY
Counsel of Record
JOHN G. NELSON
TODD S. WELCH
MOUNTAIN STATES LEGAL FOUNDATION
1660 Lincoln Street, Suite 2300
Denver, Colorado 80264
Telephone: (303) 861-0244

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BRIEF *AMICI CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION AND THE NATIONAL CATTLEMEN'S ASSOCIATION IN SUPPORT OF PETITIONER

Mountain States Legal Foundation (MSLF) respectfully submits this brief *amici curiae* in support of Mr. David H. Lucas, the Petitioner.

IDENTITIES AND INTERESTS OF *AMICI CURIAE*

Mountain States Legal Foundation is a nonprofit, membership, public interest law foundation organized pursuant to the laws of the State of Colorado and dedicated to bringing before the courts those issues vital to

the defense and preservation of individual liberties, the right to own and use property, limited government, and the free enterprise system.

MSLF members include businesses and individuals who live and work in nearly every state in the country, including South Carolina. A large number of MSLF's members work in businesses involved in the utilization and development of natural resources and, as a result, are actively involved in environmental and property rights issues.

MSLF has participated in numerous cases before this Honorable Court both as an *amicus* and as attorney for one of the parties or an intervenor, most recently in *Lujan v. National Wildlife Federation*, 497 U.S. ___, 111 L.Ed.2d 695 (1990) and *Mountain States Legal Foundation v. National Wildlife Federation*, 497 U.S. ___, 111 L.Ed.2d 775 (1990).

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NCA provides the beef cattle industry with an organization through which its members function collectively to advance the economic, political and social interests of the U.S. cattle industry and to work toward solution of

industry problems in the national economy. NCA's principal services are to manage industry issues, to influence government, to influence public opinion, to provide information and to serve as spokesman for the industry.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

Amici adopt the Petitioner's Statement of the Case and Statement of the Facts.

SUMMARY OF ARGUMENT

In order to determine when the Fifth Amendment requires the payment of "just compensation" to the victim of a "regulatory taking," courts have been required to choose between two mutually exclusive tests: the "diminution in value" test, which requires the payment of "just compensation" under the Fifth Amendment; and the "nuisance exception" test which upholds government regulation without compensation to the property owner. The instant case compels this Honorable Court to clarify the manner in which these tests are to be applied, by delineating the murky middle ground where these tests collide.

The "diminution in value" test necessitates that, when government regulation denies an owner the ability to make economically viable use of his or her land, the government must exercise its power of eminent domain and pay "just compensation."

On the other hand, the "nuisance exception" obviates any requirement for the payment of "just compensation" if the governmental entity merely regulates a land use which invades the rights of nearby property owners. Since such an invasion cannot take place unless the regulated land use constitutes a public nuisance, the "nuisance exception" must be limited to cases of nuisance.

In its opinion below, *Lucas v. South Carolina Coastal Council*, 404 S.E. 2d 895 (S.C. 1991), the Supreme Court of South Carolina misconceives and misapplies both tests. First, the court expands the "nuisance exception" until it swallows the Fifth Amendment, holding that the state may utilize the "nuisance exception" – and thereby be protected from the payment of "just compensation" – simply by designating any land use which it seeks to prohibit as "harmful." Second, the court then uses this aberration to obliterate the "diminution in value" test, holding that the test is inapplicable as a result of the state's decision that the targeted land use is "harmful." According to the South Carolina Supreme Court, that decision by the state is enough to shield the state from the payment of "just compensation" and to deny citizens the protection of the Fifth Amendment even when the state's decision completely destroys individual property rights.

The decision of the Supreme Court of South Carolina violates both the Takings Clause as well as numerous Supreme Court precedents. Therefore, this Honorable Court must reverse the judgment of the South Carolina Supreme Court and vindicate Mr. Lucas' constitutional rights.

ARGUMENT

I. AN ACT OF REGULATION WHICH DENIES AN OWNER ECONOMICALLY VIABLE USE OF HIS OR HER LAND REQUIRES AN EXERCISE OF EMINENT DOMAIN AND THE PAYMENT OF JUST COMPENSATION.

Imposition of a regulation which denies an owner the economically viable use of his or her land is equivalent to an exercise of the power of eminent domain, and requires the payment of "just compensation." Because the South Carolina Coastal Commission's (Commission's) set-back line prohibited Petitioner from making any use of his property, the judgment of the South Carolina Supreme Court must be reversed.

The police power and the power of eminent domain are distinctly different concepts. In the exercise of eminent domain, property or an easement therein is taken from the owner and applied to public use. Under the exercise of police power, government regulation denies the owner the full use of his property, but the property is not actually seized by the government. *See generally*, 1 *Nichols, Eminent Domain* § 1.42(2) (Rev. 3d ed. 1990).

However, when regulation goes too far, there must be an exercise of eminent domain and the payment of just compensation to sustain the action of the governmental entity.

This rule dates from the seminal case of *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). In *Pennsylvania Coal*, the Court ruled upon the validity of a state statute barring the mining of coal in such a way as to cause the subsidence of any structure used for human habitation.

The question presented was whether the police power could be stretched far enough to cover this regulation.

Writing for the Court, Justice Holmes answered in the negative. After noting that "the right to coal consists of the right to mine it," Holmes stated that "[t]o make it commercially impractical to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." *Id.* at 414. Because the statute barred the owner from making use of his property, it was equivalent to an exercise of the power of eminent domain and required the payment of "just compensation."

This decision has remained the cornerstone for Takings Clause analysis for almost 70 years. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), contains an especially clear statement of that reasoning. In *Penn Central*, the Court held that "[w]e must consider whether the interference with appellants' property interest is of such a magnitude that 'there must be an exercise of eminent domain and compensation to sustain it,' " *id.* at 136 (quoting *Pennsylvania Coal*), and emphasized that the city's zoning ordinance could be upheld only because it did not deny Penn Central's right to make "economically viable use" of its property. *Id.* at 138, n. 36.

Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470 (1987), upholds the same reasoning. In *Keystone*, the issue was whether another Pennsylvania statute restricting mining operations in order to prevent surface subsidence violated the Takings Clause guarantee. Using a two-pronged analysis, the Court affirmed the statute First, it concluded that the statute fell within the "nuisance exception" and hence did not trigger the requirement

of "just compensation." It then held that Keystone had also "failed to make a showing of diminution of value sufficient to satisfy the test set forth in *Pennsylvania Coal* and our other regulatory takings cases." *Id.* at 492.[1]

Application of these principles to the instant case is simple. The trial court found that Lucas had been denied "all incidence of private ownership" of his property and that the property had "been rendered valueless" by the Commission's action. *Lucas v. South Carolina Coastal Commission*, C/A No. 88-CP-10, slip. op. at 2-3 (C.P. Charleston County, S.C. Jan. 5, 1989). Under the standard enunciated by the U.S. Supreme Court, this action amounted to an assertion of eminent domain without "just compensation." Clearly, the judgment of the South Carolina Supreme Court must be reversed.

The South Carolina Supreme Court holding that *Keystone* implicitly overruled *Pennsylvania Coal* and its progeny must be brushed aside. First, it is not within the province and the authority of the South Carolina Supreme Court to simply ignore clearly stated U.S. Supreme Court precedent. Second, the analysis of the Supreme Court of South Carolina is neither sound nor persuasive.

The South Carolina Supreme Court held, essentially, that under *Keystone* the "nuisance exception" must be

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[1] Numerous other cases uphold *Pennsylvania Coal*'s rule. *See, e.g., Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Agins v. Tiburon*, 447 U.S. 255 (1980); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962).

applied to all cases of government regulation, including the instant case.[2] This interpretation is faulty for a number of reasons. First, it presupposes that the *Keystone* Court casually overruled the entire *Pennsylvania Coal* line of cases without so much as a single word of comment. To the contrary, the *Keystone* Court actually reaffirmed *Pennsylvania Coal* and its progeny. Second, this interpretation presupposes that the nuisance exception must have been applied, in the past, to the *Pennsylvania Coal* line of cases. However, as Chief Justice Rehnquist noted in *Keystone*, the Court has never applied the "nuisance exception" to allow complete extinction of the value of a parcel of property. *See Keystone, supra*, at 513 (Rehnquist, C.J., dissenting). The reason for this is straight forward. Under *Pennsylvania Coal*, the government is forced to exercise its power of eminent domain, triggering the "just compensation" requirement. In contrast, the "nuisance exception" only applies to the police power. Conceptually, the two are very different.

Clearly, then, *Keystone* could not be used to eliminate the "just compensation" requirement in the instant case. This Court must reverse the judgment of the South Carolina Supreme Court.[3]

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[2] As will be demonstrated below, the true scope of the "nuisance exception" does not even come close to encompassing this case.

[3] The great majority of lower court cases agrees that *Pennsylvania Coal's per se* compensation requirement survives *Keystone*. *See McDougal v. County of Imperial*, slip op. at 12-20 (9th Cir. Aug. 20, 1991) ("We cannot agree that any legitimate purpose automatically trumps the deprivation of all economically viable use."); *Esposito v. South Carolina Coastal Council*,

(Continued on following page)

II. THE NUISANCE EXCEPTION TO THE FIFTH AMENDMENT IS STRICTLY LIMITED TO ACTIVITIES TANTAMOUNT TO PUBLIC NUISANCES.

The "nuisance exception" provides that the government may regulate private land use without triggering the Fifth Amendment's "just compensation" requirement when the regulation is necessary to prevent an invasion of the rights of other members of the community. Since the rights of other members of the community can be invaded only by a public nuisance, the "nuisance exception" to the Fifth Amendment must be limited to cases of nuisance.

Mugler v. Kansas, 123 U.S. 562 (1887), was the genesis of the "nuisance exception." In *Mugler*, the issue was whether the state could bar Mugler from manufacturing

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(Continued from previous page)

slip op. at 7-10 (4th Cir. July 3, 1991); *Whitney Benefits, Inc. v. United States*, 926 F. 2d 1169, 1176 (Fed. Cir. 1991) ("Nothing in *Keystone* . . . supports the notion that public purpose alone permits the total destruction of property rights without compensation."); *Yancey v. United States*, 915 F. 2d 1534, 1540 (Fed. Cir. 1990) ("We favor . . . position that the *Keystone* opinion did not hold that the nature of governmental activity conclusively forecloses all claims for just compensation."); *Department of Natural Resources v. Indiana Coal Council, Inc.*, 542 N.E. 2d 1000 (Ind. 1989) *cert. denied*, 110 S. Ct. 1130 (1990); *Easter Lake Estates, Inc. v. Polk County*, 444 N.W. 2d 72, 75-76 (Iowa 1989) ("Ordinarily, [police powers] may be exercised without payment of just compensation. The use of police power may rise to the level of a compensable taking, however, if the control or regulation substantially deprives the owner of the property's use and enjoyment.") (citations omitted). *Contra, Empire Kosher Poultry, Inc. v. Hallowell*, 816 F. 2d 907 (3d Cir. 1987)

alcohol on his property. Mugler challenged the statute on the grounds that it destroyed his property interest in his brewery equipment without "just compensation."

The Court rejected Mugler's claim. Its reasoning rested on two propositions. The Court found that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." 123 U.S. at 665. The Court held further that the manufacture of a noxious substance like alcohol harmed the community. Thus, concluded the Court, the state could destroy Mugler's property interests without compensating him for his loss.

A close reading of *Mugler* demonstrates that the exception created by the Court was limited to activities tantamount to a public nuisance. The state argued that buildings used for the production or sale of alcohol constituted a nuisance. *Mugler*, 123 U.S. at 652. The Court agreed, using the term "nuisance" to describe Mugler's business 14 times during its opinion.[4]

On a more basic level, the Court's reasoning would not permit any expansion of the "nuisance exception" beyond the narrow circumstance of enjoining a public nuisance. *Mugler* was founded upon the very simple ground that a governmental entity could bar property owners from invading the rights of other members of the

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[4] In *Florida Rock Indus. v. United States*, 791 F. 2d 893, 900 (Fed. Cir. 1986), the Federal Circuit concurred with this analysis, attributing *Mugler* to the Court's view of alcohol as a "septic" fluid. Thus, the specific holding in *Mugler* can be attributed to the era's vigorous temperance movement.

community without any requirement that the governmental entity pay "just compensation." The actions of such a governmental entity could be justified only if the prohibited activity constituted a nuisance. Thus, *Mugler*'s "nuisance exception" to the requirements of the Fifth Amendment is just that: a *nuisance* exception.

Curtin v. Benson, 222 U.S. 78 (1911), continued this line of reasoning. In *Curtin*, the issue was whether the Secretary of the Interior could condition a private landholder's right to graze livestock – upon his own land – on compliance with regulations allegedly designed to protect Yosemite National Park, which surrounded the private land. Imposition of the conditions would have destroyed the landholder's ability to make use of his land.

The Supreme Court struck down the restrictions, holding that the government could only prevent "a misuse or an illegal use" without paying "just compensation." *Id.* at 86. The Court held that the "nuisance exception" did not allow the government to bar a "legal and essential use, an attribute of its ownership," *id*, even though the government considered that use to be harmful.

Modern cases have preserved this essential element of the right to own and use property. *Keystone Bituminous Coal Ass'n v. DeBenedictus*, 480 U.S. 470 (1987), contains the Court's most recent discussion of the issue. In *Keystone*, the question was whether a state statute restricting coal mining in order to guard against surface subsidence effected an unconstitutional taking of private property. The Court ruled that because such mining was

"tantamount to a public nuisance," it fell within the "nuisance exception." *Id.* at 491.[5]

The *Keystone* Court provided an especially clear statement of its rationale. Citing *Mugler*, the Court declared that all property is held subject to the restriction that the owner cannot use it in a way that would be "injurious" to others, and noted that "the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it." *Id.* at 492. The Court added that the "nuisance exception" could be understood "on the simple theory that since no individual has a right to use his property so as to create a nuisance . . . the State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity." *Id.* at 491, n. 20.[6]

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[5] Other "nuisance exceptions" to the Fifth Amendment have also rested on discrete and narrow circumstances. *See, e.g., Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (urban brickyard); *Miller v. Schoene*, 276 U.S. 272 (1928) (forest infected with apple rust disease located near apple orchards); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (quarrying below water table near town's water supply). Thus, the actual holdings of these cases are consistent and clear: the "nuisance exception" cannot be expanded beyond those uses that are public nuisances.

[6] Professor Epstein bases his concept of the Fifth Amendment on the mirror image of this explanation. Epstein asserts that the government possesses no rights or powers beyond those possessed by private citizens. Therefore, the government's power to regulate use of private property must be limited to cases of nuisance because that is the limit of the corresponding private right. As Epstein convincingly demonstrates, expansion of the "nuisance exception" beyond true

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It should be noted that the *Keystone* Court stated the exception in terms of uses "tantamount to public nuisances" or "nuisance-like" activities. *Keystone*, 480 U.S. at 491 & n. 20. Therefore, it must be conceded that, as the *Keystone* Court saw it, the "nuisance exception" does not simply elevate South Carolina nuisance law to constitutional status. Rather, as the final arbitrer of the meaning of the Consitution, the Court must determine what qualifies as a "nuisance exception" to the Fifth Amendment.

However, it is beyond doubt that the exception must be limited to nuisance-like activities. Expansion beyond such activities would not only violate the rationale for the exception's very existence, but would destroy the protection of property rights guaranteed by the Fifth Amendment. Thus, the Court must look to the common law for guidance in making its determination. The "nuisance exception" can apply only to acts which cause an unreasonable invasion of the property rights of others.

The "nuisance exception" is inapplicable to the present case. It is simply not possible to conceive of the construction of a beach front house as invading the property rights of others. The construction of a beach front bungalow bears little resemblance to the property uses which the Court has identified as public nuisances. Indeed, the South Carolina Legislature does not regard beach front homes as public nuisances. The South Carolina Beachfront Management Act provides for a gradual, forty-year retreat from the coastal zone. *See* S.C. Code

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nuisance is nothing more than theft cloaked in the garb of public policy. R. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985).

Ann. § 48-39-280. If homes along the beaches of South Carolina constituted true public nuisances, the Legislature would have eliminated immediately such nuisances, not stretch their elimination out over several decades.

Instead this case concerns a naked attempt on the part of South Carolina to seize Lucas' property without paying "just compensation." This action does not even come close to the "nuisance exception."

The South Carolina Supreme Court held that all the state had to do to claim the protection of the "nuisance exception" was to declare the proposed land use "harmful." *See Lucas v. South Carolina Coastal Council*, 404 S.E. 2d 895, 899-902 (S.C. 1991). However, this holding is fatally flawed.

Its most obvious shortcoming is that it completely ignores the reasoning of the "nuisance exception" cases. The U.S. Supreme Court has carefully limited the "nuisance exception" to actions tantamount to a public nuisance. A simple declaration of "harm" cannot substitute for this factual basis. To find "harm" to be the equivalent of "nuisance" is to ignore the legal meaning of the latter. "Nuisance" means not merely the use of property that some segments of society may view as "harmful" or may not be the highest and best uses of such property, but uses that invade the property rights of others.

Thus, the "nuisance exception" to the Fifth Amendment prohibition against regulatory taking is an essential component of the protection of property guaranteed by the Constitution. Just as the Fifth Amendment protects the property of individuals from government intrusion,

the "nuisance exception" protects the property of individuals from the unreasonably intrusive actions of private parties. However, because of its ability to destroy the protections of the Fifth Amendment, the "nuisance exception" must be limited to true "nuisances."

The South Carolina Supreme Court apparently believes the "nuisance exception" should be co-extensive with the police power. However, this holding violates clearly stated Supreme Court precedent. "[A]s the current Chief Justice has explained, 'the nuisance exception to the takings guarantee is not coterminous with the police power itself.' " *Keystone Bituminous Coal Ass'n v. DeBenedictus*, 480 U.S. 470, 491 n. 20 (1987); *quoting Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 145 (1978) (Rehnquist, J., dissenting).

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982), contains an especially clear statement of this principle. In *Loretto*, the issue was whether a statute requiring landlords to allow cable television companies access to their properties violated the Takings Clause. After noting that enactment of the statute was within the state's police power, the Court ruled that "whether an otherwise valid regulation so frustrates property rights that compensation must be paid" was a separate question. *Id.* at 425.

The South Carolina Supreme Court's careless expansion of the "nuisance exception" virtually eliminates the Fifth Amendment, allowing any government to convert private property to public use simply by declaring the property owner's use of the property to be

"harmful." The essence of the Fifth Amendment lies in the proposition that the government cannot convert private property to public use merely by asserting its desire to do so. "[A] State, by *ipse dixit*, may not transform private property to public property . . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). "A strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922). The South Carolina Supreme Court's formulation would overturn these principles and allow any government to confiscate private property by simply declaring that public policy requires it.

CONCLUSION

As Justice Stevens aptly noted in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987) (Stevens, J., dissenting), this Honorable Court's regulatory takings decisions have been "open-ended and standardless." *Id.* at 340. This case presents the opportunity to draw coherent, principled distinctions under the Fifth Amendment. Justice demands that this Honorable Court seize this opportunity, and reverse the decision of the South Carolina Supreme Court.

It is an opportunity which this Honorable Court must seize, not simply because of the issues presented by the instant case, but because of the regulatory activities being

undertaken by governmental entities nationwide in the name of "environmental protection." Despite the claim of self-styled "environmentalists" that the American people are willing to pay any price to achieve "environmental goals," almost all of these "goals" are being achieved, not by "the constitutional way of paying for the change," but through a regulatory "shorter cut."

For example, federal officials have announced a national "no net loss of wetlands" policy by which they seek to regulate millions of acres of privately-owned land, not because the use of these lands by the owners will cause harm to their neighbors, but because federal officials believe these private lands serve a higher "public use" by remaining "wet" (even if they are not wet).

Furthermore, federal officials have announced recently their intention to designate an additional 3,000 plants and animals as endangered or threatened species under the Endangered Species Act. The Endangered Species Act prohibits certain conduct on private lands not because the prohibited uses of these private lands will interfere with the lands of others, but because Congress has declared that private lands must serve the "public use" of species habitat.

In the superheated environmental rhetoric of the day and in light of the "weird science" used to justify even the most Draconian of regulatory actions, these and other regulations may be the manner in which governmental entities will seek to soothe the nation's environmental conscience. However, the Constitution mandates that "[a] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter

cut than the constitutional way of paying for the change." It remains for this Honorable Court to remind these forgetful governmental entities of the requirements of our Constitution.

Respectfully submitted,

WILLIAM PERRY PENDLEY
Counsel of Record
JOHN G. NELSON
TODD S. WELCH
MOUNTAIN STATES LEGAL FOUNDATION
1660 Lincoln Street, Suite 2300
Denver, Colorado 80264
Telephone: (303) 861-0244

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In The

Supreme Court of the United States

October Term, 1991

DAVID H. LUCAS,

Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of South Carolina

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER DAVID H. LUCAS

RONALD A. ZUMBRUN
*EDWARD J. CONNOR, JR.
R. S. RADFORD
*Counsel of Record
Pacific Legal Foundation
2700 Gateway Oaks Drive,
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amicus Curiae, Pacific Legal Foundation

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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On Writ of Certiorari to the Supreme Court of the State of South Carolina

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER DAVID H. LUCAS

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of petitioner David H. Lucas. Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

INTEREST OF AMICUS

Pacific Legal Foundation is a nonprofit corporation organized under the laws of the State of California for the

purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such action only when the Foundation's position has broad support within the general community. PLF's Board has authorized PLF participation as amicus curiae in this matter.

It is believed that PLF's public policy perspective and litigation experience in support of private property rights will provide a helpful additional viewpoint on the constitutional issues presented in the case at bar. PLF has participated in numerous cases involving the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Its attorneys were counsel of record in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and PLF participated as amicus curiae in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); and *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

PLF participated in the present case as amicus curiae in support of petitioner before the South Carolina Supreme Court and filed a brief with this Court in support of the petition for writ of certiorari.

The opinion below holds that a regulation characterized by the court as enacted to prevent "serious public harm" is immune to challenge under the Takings Clause of the United States Constitution, even though it deprives a citizen of all economically viable use of his property.

This holding directly conflicts with well-established precedent of this Court which teaches that a regulatory taking occurs whenever a property regulation deprives owners of economically viable use of their property. By erroneously positing a broad "public harm" exception to the Takings Clause, the South Carolina Supreme Court has deprived petitioner of fundamental rights guaranteed by the United States Constitution.

STATEMENT OF THE CASE

David H. Lucas is the owner of two undeveloped oceanfront lots in Charleston County, South Carolina, which he purchased on December 3, 1986, for $975,000. On July 1, 1988, the South Carolina General Assembly adopted the Beachfront Management Act which regulated development along the South Carolina coastline by imposing statutorily mandated setback lines. The Beachfront Management Act is administered by respondent South Carolina Coastal Council.

The Act's setback line precluded petitioner from building a residence or making any other economically reasonable use of his property. Since the two lots are located seaward of the setback line, the Act required them to remain forever undeveloped.

Petitioner filed an action in the South Carolina Court of Common Pleas asserting that the Act's restrictions on the use of his lots amounted to a taking of his private property for public use without just compensation. The court agreed and awarded petitioner compensation for

the regulatory taking. In reaching this conclusion, the court made the following finding of fact:

> "I find that the imposition of building restrictions on Lots 22 and 24 imposed by the South Carolina Coastal Council deprives Lucas of any reasonable economic use of the lots, has eliminated the unrestricted right of use, and renders them valueless." Order of the Court of Common Pleas at 5.

On appeal the South Carolina Supreme Court reversed, although it did not dispute the factual finding that the Beachfront Management Act effectively deprives petitioner of all economically viable use of his property. Instead, the reversal was based on the court's assertion that the Takings Clause never requires compensation when a regulation is enacted to prevent a serious public harm. *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 899-900 (S.C. 1991). This ruling directly conflicts with the established precedent of this Court on a question of federal constitutional rights.

SUMMARY OF ARGUMENT

The holding of the court below, that the Beachfront Management Act has not taken petitioner's property without just compensation, directly conflicts with this Court's regulatory takings doctrine.

In 1922, this Court held that government regulation can be challenged as a taking under the Takings Clause of the Fifth Amendment to the United States Constitution.

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). Writing for the majority, Justice Holmes said:

> "The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415.

Justice Holmes, while referring to the Fifth Amendment's Takings Clause as an "absolute protection," nevertheless recognized that it was qualified by "the police power." *Id.*

But given this qualification, Justice Holmes also observed that "the natural tendency of human nature is to extend the qualification more and more until at last private property disappears." *Id.*

This description embraces precisely what has occurred in the instant case. And, as Justice Holmes stated, such a result "cannot be accomplished in this way under the Constitution of the United States." *Id.*

Although this Court has in more current times referred to Justice Holmes' analysis as "established doctrine" (*First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. at 316), this Court has also recognized that the question of what constitutes a regulatory taking "has proved to be a problem of considerable difficulty." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 123 (1978).

What has always been clear, however, is that the takings issue is to be considered in light of the guiding principle that the Fifth Amendment's Takings Clause "was designed to bar Government from forcing some

people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 48 (1960).

In *First Church*, this Court referred to this principle as "axiomatic." 482 U.S. at 318. And in applying this principle, it has long been recognized that "the question at bottom is upon whom the loss of the changes desired should fall." *Pennsylvania Coal*, 260 U.S. at 416.

In *Penn Central*, the Court said that it had been "unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." 438 U.S. at 124.

The Court, in *Penn Central*, nevertheless "identified several factors that have particular significance." *Id.* The Court referred to:

1. "the character of the governmental action,"
2. the "economic impact of the regulation," and
3. "the extent to which the regulation has interfered with distinct investment-backed expectations." *Id.*

These factors have never been held to be exclusive. They are merely means for analyzing the question of whether, in a given factual situation, the regulation goes too far. In other words, such factors assist in determining whether the regulation in reality is an attempt to load "upon one individual more than his just share of the burdens of government." *See Keystone Bituminous Coal*

Association v. DeBenedictis, 480 U.S. at 512 (Rehnquist, C.J., dissenting) (citing *Monongahela Navigation Company v. United States*, 148 U.S. 312, 325 (1893)).

As stated in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980):

> "The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest."

From the generalized considerations spelled out in *Penn Central*, where the facts are suffiently extreme, however, two bright-line tests have evolved which weigh so heavily in favor of a takings conclusion that when either one occurs, it can fairly be said that the regulation goes "too far" and that "fairness and justice" require the finding of a taking.

The first is where the character of the governmental action is such that it fails to substantially advance a legitimate state interest. *Nollan v. California Coastal Commission* is an example of this bright-line test and a taking was found despite the fact the property owner was left with reasonable use of the property—a conclusion relied on earlier by the California court below. *See Nollan*, 483 U.S. at 830.

The second bright-line test recognizes a taking wherever the economic impact of the government regulation is so severe as to deny an owner economically viable use of the property. *Hodel v. Irving*, 481 U.S. 704, illustrates this

test. There the regulation amounted to "virtually the abrogation of the right to pass on a certain type of property." *Id.* at 716.

In *Agins*, this Court made it clear that either finding alone would result in a taking. The Court summarized the rule as follows:

> "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land." *Agins*, 447 U.S. at 260.

In *Keystone*, 480 U.S. at 485, this Court, quoting *Agins*, referred to these two factors as having "become integral parts of our takings analysis."

Of course, it follows that even though a government regulation may survive these bright-line tests, this does not end the inquiry. The character of the government action is still relevant. So also is the regulation's economic impact on the property. And this Court has given particular attention to interference with reasonable investment-backed expectations. *See, e.g., Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979). But, given the foregoing evolution of this Court's takings analysis, it is helpful, as a practical matter, to approach an individual case initially with the bright-line tests for if the regulation does not survive them, the answer is at hand.

In the present situation, it is clear that the regulation does not survive the second test.

The court below relies on a broad "public harms" exception to the Takings Clause stemming from the 19th

Century due process case, *Mugler v. Kansas*, 123 U.S. 623 (1887). However, *Mugler* and its progeny cannot support this interpretation for two reasons. First, *Mugler* was decided 30 years before this Court first recognized the possibility of regulatory takings. Second, neither *Mugler* nor any other decision of this Court upholds the validity of a regulation that—like the Beachfront Management Act—deprives an owner of all economically viable use of his property. And if, despite its prior holdings, this Court should adopt some kind of a "nuisance" exception which allows government to deprive an owner of economically viable use of property, it is inconceivable that the construction of a private residence on a citizen's own land could be characterized as a nuisance or nuisance-like activity.

Finally, even if this Court were to find that the regulation survived the bright-line tests, it would still not survive scrutiny under the more general considerations which have been looked to by this Court. There has been an obvious frustration of investment-backed expectations. And the character of the government action weighs heavily in favor of a taking conclusion as was found by the dissenting justices in the South Carolina Supreme Court.

ARGUMENT

I

THE COURT BELOW FUNDAMENTALLY MISCONSTRUED THIS COURT'S REGULATORY TAKINGS DOCTRINE

A. This Court Has Established Two "Bright-Line" Tests for Regulatory Takings

This Court has recognized that, absent compensation, land use regulations will effect an unconstitutional taking if they fail to "substantially advance legitimate state interests," *or* if they "den[y] an owner economically viable use" of property. *Agins v. City of Tiburon*, 447 U.S. at 260. These criteria are stated in the disjunctive; either is sufficient to establish a regulatory taking without further analysis. Accordingly, this two-part inquiry can be viewed as a "bright-line" threshold test that land use regulations must clear as a first step in determining whether they violate the Takings Clause.

Both elements of this two-pronged test must be resolved in the government's favor before a reviewing court need further analyze the challenged regulation. *See* Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches*, 39 Hastings L.J. 335, 357 (1988). *See also Seawall Associates v. City of New York*, 542 N.E.2d 1059, 1068 (N.Y. 1989) (referring to two-prong "threshold test" in regulatory takings analysis). If *either* prong of the test is decided in favor of the property owner, the measure will be found to constitute a regulatory taking. *See, e.g.*, Falik & Shimko, *The "Takings" Nexus—The Supreme Court Chooses a New Direction in Land-Use Planning: A View from California*, 39 Hastings L.J. 359, 362 (1988).

It is helpful to trace the gradual evolution of the two-pronged threshold test over the 70 years since this Court first recognized that otherwise legitimate police-power regulations can so attenuate the rights of property owners as to effect a taking under the Fifth Amendment. Its roots can be found in the seminal 1922 regulatory takings case, *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393.

In *Pennsylvania Coal*, Justice Holmes struggled to identify the relevant factors that determine when a regulation "goes too far" and must be recognized as a taking. *Id.* at 415. On the one hand, Holmes was concerned with the "extent" or "sufficiency" of the governmental interest advanced. *Id.* at 413-14. Justice Holmes clearly recognized, however, that a legitimate police-power rationale could not in itself insulate a regulation from challenge under the Takings Clause.

The Pennsylvania Supreme Court had upheld the Kohler Act on precisely the same grounds that the South Carolina Supreme Court relies upon in the case at bar: "that the statute was a legitimate exercise of the police power." *Id.* at 412. Holmes perceived, however, that if the "seemingly absolute" protections of the Takings Clause could be overridden by the police power, "the natural tendency of human nature is to extend the qualification more and more until at last private property disappears." *Id.* at 415.

In other words, *Pennsylvania Coal* established that finding a regulation to be a legitimate exercise of the police power is a *necessary but not sufficient condition* to pass constitutional muster under the Takings Clause. Beyond the requirement of police power legitimacy, this

Court added a second test: the "extent of the diminution" of the victim's property interest. *Id.* at 413. Since the Kohler Act made it "commercially impracticable" to mine certain coal deposits, the regulation was found to violate the Takings Clause *despite* its rationale as a public health and safety measure. *Id.*

The two inquiries highlighted in *Pennsylvania Coal*—the character of the governmental interest and the diminution of private property rights—have gained increasing significance under this Court's regulatory takings doctrine and have acquired sharper focus and force over time.

More than 50 years after *Pennsylvania Coal*, this Court again examined its regulatory takings doctrine in *Penn Central Transportation Corp. v. City of New York*, 438 U.S. 104. Writing for the Court, Justice Brennan acknowledged that regulatory takings law remained an area of "ad hoc factual inquiries." *Id.* at 124. However, two of the factors singled out as especially relevant were the "character of the governmental action" and the "economic impact of the regulation" on the claimant. *Id.*

Penn Central's inquiry into the "character" of a challenged regulation was the direct linear descendant of Justice Holmes' concern with the "sufficiency" or "extent" of the governmental interest in *Pennsylvania Coal*. Pursuant to this inquiry, the *Penn Central* Court found that New York's landmark regulation fell within the city's police power, serving to promote the public "health, safety, morals or general welfare." *Id.* at 125. Significantly, however, the inquiry did not stop there.

Having satisfied itself that New York's landmark regulation was a legitimate exercise of the police power, this Court then turned to the second issue, the economic impact of the regulation on petitioner's property. *Penn Central*'s regulatory takings claim was rejected *only* after the Court determined that the owner could continue to make profitable use of the regulated property. *Id.* at 135-38.

In 1980, the language of the regulatory takings test took a more succinct form. The *legitimacy* prong now requires suspect regulations to "substantially advance legitimate state interests;" while the *economic impact* prong examines whether they "den[y] an owner economically viable use" of property. *Agins v. City of Tiburon*, 447 U.S. at 260. This Court's most recent refinement of these standards was provided in *Nollan v. California Coastal Commission*, a landmark regulatory takings case which is completely ignored by the court below. *Nollan* sharpened the legitimacy prong of the two-part test to include an inquiry into whether the regulated use of property is responsible for causing the harm which the regulation addresses. *Nollan*, 483 U.S. at 834-37. Even more significantly, *Nollan* expressly requires courts to apply a *heightened level of scrutiny* in examining the purpose and impact of suspect regulations. *Id.* at 834 n.3.

Over the past decade the two-fold legitimacy/impact inquiry has taken on the sharpness and prominence typically associated with a "bright-line" threshold test. In keeping with this development, this Court has struck down measures violating *either* prong of the two-part test without further inquiry. The *Nollan* decision clearly illustrated that when a regulation fails to substantially

advance a legitimate government interest a taking occurs regardless of the economic impact on the property owner. Conversely, this Court has also made it clear that regulations which deprive an owner of economically viable use of property violate the Takings Clause regardless of the merits of the state interests they may advance. *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264, 295-96 (1981); *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 14 (1984).

The emergence of the bright-line legitimacy/impact threshold test does not mean that other considerations have no place in modern regulatory takings analysis. If a regulation *violates* either prong of the threshold test, compensation is always required under the Takings Clause. However, if the challenged measure *survives* the legitimacy/impact inquiry, it is then subjected to an equitable weighing of more general considerations to determine "when 'justice and fairness' require that economic injuries caused by public action be compensated by the government." *Penn Central*, 438 U.S. at 124. Among the factual issues that may enter this equitable weighing are the regulation's interference with distinct investment-backed expectations and the extent to which a particular owner is singled out to bear the full costs of what should rightfully be a general public burden.

The crucial point is that this generalized equitable analysis need only come into play, if at all, *after* it is determined that the challenged measure survives the bright-line tests. If a challenged regulation fails to substantially advance a legitimate interest *or* deprives an owner of economically viable use of property, that measure violates the Takings Clause without regard to any

other factors and without recourse to "balancing" or "exceptions."

B. South Carolina's Beachfront Management Act Clearly Violates at Least One of This Court's Threshold Tests for Regulatory Takings

The most obvious infirmity of the Beachfront Management Act is its failure to clear the second prong of this Court's threshold test for regulatory takings. The trial court in the present action made a specific factual determination that the setback lines deprived Lucas of "any reasonable economic use of the lots," and rendered the lots "valueless."

This factual determination is completely dispositive of the question at issue. This Court's modern jurisprudence of regulatory takings is unambiguous. A taking occurs "if the ordinance . . . denies an owner economically viable use of his land." *Agins*, 447 U.S. at 260. *See also Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. at 295-96 ("[a] statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of land' ") (quoting *Agins v. Tiburon*, 447 U.S. at 260).

This second prong of the threshold takings inquiry does not refer to a "balancing" of public and private interests. Indeed, it rests on an implied *presumption* that the challenged legislation falls within the legitimate authority of the state and thereby advances some public benefit, perhaps of great magnitude. The nature of the state's action is a critical inquiry only in connection with

the question of whether the first prong of the regulatory takings test has been satisfied. A finding of legitimacy satisfies the two-part threshold test *only* when coupled with a finding of no deprivation of economically viable use. If there has been such a deprivation, a taking has occurred on that ground alone regardless of the nature of the state's action.

The issue under this prong of regulatory takings doctrine is not whether a regulation's benefits are legitimate, or even whether they are worth the costs, but whether these benefits have been acquired by stripping away individual property rights protected by the Constitution. Since *Pennsylvania Coal* such means are never acceptable, regardless of the ends to be achieved.

C. This Court Has Never Recognized a "Public Harm" Exception to the Takings Clause Broad Enough to Permit the Deprivation of All Economically Viable Use of Property Without Payment of Just Compensation

The court below erroneously holds that this Court's carefully structured tests for regulatory takings may be overridden "when the regulation exists to prevent serious public harm." *Lucas*, 404 S.E.2d at 899.

As Professor Michelman has pointed out, such a broad exception to the Takings Clause would be a logical absurdity, since in most cases it is only a matter of semantics whether regulations are characterized as preventing public harms or bestowing public benefits. Michelman, *Property, Utility, and Fairness: Comments on the Ethical*

Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1196-1201 (1967). Moreover, nothing in this Court's modern regulatory takings doctrine supports such an exception. The contrary holding by the court below springs from a fundamental misconception of the historical evolution of regulatory takings law.

1. Meaningful Constitutional Interpretation Is Dependent on Historical Context

The evolution of complex constitutional doctrines seldom follows a simple linear path that can be traced with precision through the cases from the Founding down to the present day. The interpretation of key constitutional provisions typically goes through periods of flux as courts struggle to find the best "match" between the protections intended by the Founders and the social, economic, and political context in which disputes arise.

Professor Ackerman describes this process as one of *multigenerational synthesis*. Ackerman, *Constitutional Politics/Constitutional Law*, 99 Yale L.J. 453, 517 (1989). Meaningful interpretation must synthesize the text of the Federalist Constitution with shifts in the "constitutional status quo" marked by such historical watersheds as Reconstruction and the New Deal. *Id.* at 516-21.

A corollary of this problem is that the contemporary relevance of any decision is at least partly a function of the era in which it was generated. To ignore historical context and conflate legal doctrines from different eras and different stages of development is to invite interpretive incoherence.

The decision below is a paradigm example of this fallacy. By resorting to the 19th Century due process rule of *Mugler v. Kansas* to dispose of a modern regulatory takings issue, the court below arrives at a result consisting of equal parts historical absurdity and doctrinal muddle.[1]

2. Mugler and Its Progeny Employ an Outdated, Single-Pronged Due Process Test Wholly Inappropriate to Modern Regulatory Takings Claims

The basic recognition that private property can be taken by excessive regulation was slow to evolve in the courts. During the early development of American constitutional law "a purely physical conception of the process

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[1] The doctrinal muddle is also reflected by the Washington Supreme Court's decision in *Presbytery of Seattle v. King County*, 787 P.2d 907 (Wash. 1990). In that case, the Washington court ruled that a regulation which "safeguards the public interest in health, safety, the environment or the fiscal integrity of an area" is insulated from any takings analysis, provided the regulation does not destroy the right to possess, to exclude others, or to dispose of the property. *Id.* at 912. The *Presbytery of Seattle* analysis is inconsistent with this Court's taking jurisprudence and improperly limits regulatory takings to only a narrow band of government actions. The South Carolina Supreme Court in the case at bar cited *Presbytery of Seattle* in support of its "public harm" exception. *Lucas*, 404 S.E.2d at 902 n.7. This Court should reverse the decision of the South Carolina Supreme Court and, in so doing, express its disapproval of the analytical framework expressed in *Presbytery of Seattle*. *See generally* Comment, *Taking Issue with Takings: Has the Washington State Supreme Court Gone Too Far?*, 66 Wash. L. Rev. 545 (1991).

of condemnation was amply sufficient." Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 Yale L.J. 221, 225 (1931). Early federal takings cases almost always dealt with physical encroachments—the outright seizure of property by government, or physical interference with the utility or accessibility of land. *See, e.g., Pumpelly v. Green Bay & Mississippi Canal Co.*, 80 U.S. 166 (1872) (flooding); *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914) (smoke damage).

As government regulation of property grew more extensive and invasive, the Takings Clause began to take on relevance as a potential source of protection for property owners. However, the argument that property regulations might require compensation under the Fifth Amendment was simply not entertained by pre-20th Century courts.

This legal environment is the key to interpreting such decisions as *Mugler v. Kansas*. In *Mugler*, the State of Kansas passed legislation driving Peter Mugler out of what had been a perfectly lawful business, thereby destroying the value of his productive capital. The Supreme Court found the law constitutionally sound, since "the public health, the public morals, and the public safety, may be endangered by the general use of intoxicating drinks." *Mugler*, 123 U.S. at 662.

Taken out of historical context and measured by the regulatory takings doctrine of 100 years later, *Mugler* seems inexplicable. In its proper context, however, it is obvious that *Mugler* can have no relevance to regulatory takings law whatever. The case was appealed to the Supreme Court as a due process violation. (Indeed, the

Takings Clause had not yet been deemed "incorporated" into the Fourteenth Amendment for application to the states. *See Chicago, Burlington & Quincy Railroad v. Chicago*, 166 U.S. 226 (1897)). The operative language in *Mugler* is the standard due process analysis of the period. The *Mugler* Court was concerned with *only* the question of whether the regulation was a legitimate exercise of the state's police powers. The impact of the regulation on Peter Mugler's property was not considered since this issue was not relevant to a due process inquiry.

Having concluded that the Kansas ordinance was a valid exercise of the police power, the *Mugler* Court's review of the case was, for all intents and purposes, concluded. The economic impact prong of modern regulatory takings analysis was not applied for the self-evident reason that the doctrine of regulatory takings did not yet exist. For the same reason, *Mugler* cannot be coherently interpreted as an "exception" to the regulatory takings principles that Justice Holmes would first speak to in *Pennsylvania Coal* some 35 years later.

3. This Court Has Never Upheld a Regulation That Deprives an Owner of All Economically Viable Use of Property

Mugler v. Kansas cannot sensibly be interpreted as an exception to this Court's regulatory takings doctrine, since it was handed down during an era prior to the recognition that regulatory takings could occur at all. It is significant however that this Court has never upheld, even in *Mugler* and its progeny, the validity of a regulation that deprives an owner of all economically viable use

of property. Thus, even if the *Mugler*-era cases are thought to retain some vitality in the modern era, they could not possibly stand for the broad "nuisance" rationale embraced by the court below.

South Carolina's Beachfront Management Act was found to deprive petitioner of "any reasonable economic use" of his property, rendering it "valueless." Order of the Court of Common Pleas at 5. The roster of this Court's decisions reveals not a single case in which such a total nullification of property rights has been upheld against a takings challenge.

The court below cites five cases in support of its assertion of a broad "public harms" exception to the Takings Clause: *Mugler*, 123 U.S. 623; *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Miller v. Schoene*, 276 U.S. 272 (1928); *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); and *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470. However, even a superficial review of these cases reveals that not one of them involved the complete diminution of economically viable use of property.

In *Mugler*, the plaintiff did not contend, nor did the Court conclude, that no structures could be built on Mugler's property, or that the regulation permitted no economically viable use of the land.

In *Hadacheck*, a city ordinance prohibited the manufacture or burning of brick within described geographical limits. The Court was thus not presented with a deprivation of all economically viable use of property, because the plaintiff was free to construct residences or other types of manufacturing enterprises on the property.

In *Miller*, the State of Virginia ordered plaintiffs to cut down a large number of ornamental cedar trees to prevent the communication of a plant disease to apple orchards in the vicinity. Plaintiffs were, however, entitled to use the felled trees and to make any other economically viable use of their property.

In *Goldblatt*, a local ordinance regulated dredging and excavating on private property. The Court found no evidence "which even remotely suggests that prohibition of further mining will reduce the value of the lot in question." *Goldblatt*, 369 U.S. at 594.

Finally, in *Keystone*, the State of Pennsylvania's Subsidence Act restricted mining practices associated with damage to residential and other structures. In concluding that the Act did not effect a taking of plaintiffs' property, this Court noted that plaintiffs had "failed to make a showing of diminution of value sufficient to satisfy the test set forth in Pennsylvania Coal and our other regulatory takings cases." *Keystone*, 480 U.S. at 492-93.

The schism between the *Keystone* majority and the dissent focused on this very point. Chief Justice Rehnquist argued that the property in question was the coal which the Subsidence Act prohibited plaintiffs from mining. *Id.* at 514 (Rehnquist, C.J., dissenting). Since the Act completely deprived plaintiffs of economically viable use of this coal, the Chief Justice regarded the Act as a taking despite its "public harm" or "nuisance" rationale: "[W]e have not accepted the proposition that the State may completely extinguish a property interest or prohibit all use without providing compensation." *Id.* at 513 (Rehnquist, C.J., dissenting). The *Keystone* majority found no

taking precisely because they adopted a broader view of the property rights at issue.

While none of the cases cited by the court below support its assertion of a broad "nuisance" exception to the Takings Clause, its reading of *Keystone* does the greatest violence to the record. By combining the *minority's* analysis of the economic impact of the Subsidence Act (complete deprivation of use) with the *majority's* conclusion (no taking), the South Carolina Supreme Court arrived at an interpretation of *Keystone* wholly at odds with the views actually set forth by any member of this Court.

4. The Historical Significance of Pennsylvania Coal

This Court's concern solely with the *validity* of challenged property regulations, without consideration of their economic impact, ended in 1922 with *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393. As discussed above, *Pennsylvania Coal* ushered in a new era by recognizing that otherwise legitimate police-power regulations may violate the Takings Clause through their impact on private property rights. In takings jurisprudence, *Pennsylvania Coal* marked a shift in the constitutional status quo as pronounced as Reconstruction or the New Deal. *See* Ackerman, *supra*.

The court below places great significance on the unremarkable proposition that *Pennsylvania Coal* did not "overrule" *Mugler*. *Lucas*, 404 S.E.2d at 900-01 (*citing Keystone*, 480 U.S. at 490-91). Such a narrow reading completely misses the significance of the decision. The

Court's concern in *Pennsylvania Coal* was not to "overrule" the due process jurisprudence of a bygone era. Rather, the justices were engaged in the larger task of forging a new line of constitutional jurisprudence appropriate to the postindustrial world of the 20th Century. *Pennsylvania Coal* is a masterful synthesis through which the original protections of the Takings Clause are made relevant to the modern social-political context of intensive and often predatory regulation.

The general principle laid down by *Pennsylvania Coal* was that courts must consider the economic impact of regulation, as well as its validity, in determining whether a taking has occurred. *Pennsylvania Coal*, 260 U.S. at 413. Justice Holmes realized that the transition to this principle would not occur as a clean, sharp break with the past. He recognized the difficulty of applying the new approach to exceptional emergencies "like the blowing up of a house to stop a conflagration." *Id.* at 415. (*Miller v. Schoene* is a prime example of such an emergency rationale—a decision standing at least as much "upon tradition as upon principle." *Pennsylvania Coal*, 260 U.S. at 416.) Nevertheless, the general direction of regulatory takings doctrine was clear.

The plain historical significance of *Pennsylvania Coal* is that the Court turned its back on the single-focused, 19th Century due process inquiry of *Mugler* and its progeny and embraced a new paradigm for the modern era. The modern takings analysis has been refined and sharpened over the past 70 years but it is unthinkable that this Court could now retrace its steps and return—like the court below—to the outmoded jurisprudence of a previous age.

II

EVEN IF THIS COURT WISHES TO ESTABLISH A NOXIOUS USE EXCEPTION TO THE TAKINGS CLAUSE, THIS EXCEPTION COULD NOT REASONABLY BE HELD TO ENCOMPASS PETITIONER'S CONSTRUCTION OF A PERSONAL RESIDENCE ON HIS OWN LAND

Even if this Court opts for the creation of a "noxious use" or "nuisance" exception, the facts of the case at bar cannot be easily brought within such an exception.

A nuisance occurs when the use of property has noxious impacts on neighboring landowners. In the present case, petitioner has been prohibited from building a house on his own land. Any "noxious effect" of this activity, including erosion and storm damage, could easily be restricted to petitioner's own property with *no* impact on the property of adjoining landowners.

The Beachfront Management Act, quoted extensively in the opinion below, primarily addresses the need to protect the South Carolina coastline from erosion. It does not, and cannot, portray the construction of a private residence as a "noxious" use of property on a par with the maintenance of an urban brickyard or gravel quarry. As was recently observed by the dissent in *Esposito v. South Carolina Coastal Council*, 939 F.2d 165 (4th Cir. 1991):

> "The rapidity with which rental beach houses are gobbled up by the public causes me to doubt that they are, at least yet, generally regarded as 'tantamount to a public nuisance.' . . . [T]he Act's gradual forty-year retreat scheme, rather than immediate destruction of all offending structures, is clear proof that the . . . residences

are not dire threats to public safety and welfare." *Id.* at 173 n.2.

Given this reality, the Beachfront Management Act's conclusory references to the protection of "life and liberty" appear to be mere verbiage. Such boilerplate declarations cannot survive the close scrutiny required by this Court in *Nollan*.

The right of an individual to build a private residence on his own land is a fundamental attribute of liberty, grounded in natural law and transcending the existence of the state. As this Court recognized in *Nollan*, this fundamental right "cannot remotely be described as a 'governmental benefit.' " *Nollan*, 483 U.S. at 833 n.2. Still less can it be legislatively redefined as a noxious use, in order to evade the clear requirements of the Takings Clause.

CONCLUSION

In an era of increasingly complex and pervasive environmental regulations, this Court should reaffirm the preeminence of the United States Constitution. As laudable as the objectives of the Beachfront Management Act may purport to be, it must still be recognized that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal*, 260 U.S. at 416.

For this reason, and the reasons set forth above, amicus respectfully requests that this Court reverse the decision of the court below.

DATED: January, 1992.

Respectfully submitted,

RONALD A. ZUMBRUN
*EDWARD J. CONNOR, JR.
R. S. RADFORD
*Counsel of Record
Pacific Legal Foundation
2700 Gateway Oaks Drive,
Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amicus Curiae,
Pacific Legal Foundation

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No. 91-453

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DAVID H. LUCAS,

Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

On Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF AMICUS CURIAE OF THE AMERICAN FARM BUREAU FEDERATION AND THE SOUTH CAROLINA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONER

JOHN J. RADEMACHER
General Counsel
RICHARD L. KRAUSE
Assistant Counsel
AMERICAN FARM BUREAU FEDERATION
225 Touhy Avenue
Park Ridge, Illinois 60068
(708) 399-5700

JAMES D. HOLZHAUER
Counsel of Record
MICHAEL F. ROSENBLUM
CLIFFORD M. SLOAN
TIMOTHY S. BISHOP
MAYER, BROWN & PLATT
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Amici Curiae

Midwest Law Printing Co., Chicago 60611, (312) 321-0220

QUESTION PRESENTED

Whether the Takings Clause of the Fifth Amendment requires a state to pay just compensation when it deprives a person of all economically viable use of his land.

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BRIEF AMICUS CURIAE OF THE AMERICAN FARM BUREAU FEDERATION AND THE SOUTH CAROLINA FARM BUREAU FEDERATION IN SUPPORT OF PETITIONER *

INTEREST OF THE AMICI CURIAE

The American Farm Bureau Federation (AFBF) is a voluntary general farm organization formed in 1919 and organized in 1920 under the General Not-For-Profit Corporation Act of the State of Illinois. It has its principal offices in Park Ridge, Illinois. AFBF was founded to pro-

* Written consents of the parties to the filing of this brief have been filed with the Clerk.

tect, promote, and represent the business, economic, social and educational interests of American farmers and ranchers. It has member organizations in all 50 states and Puerto Rico representing more than 3.8 million member families.

The South Carolina Farm Bureau Federation (SCFBF) is a voluntary non-profit membership association organized under the laws of the State of South Carolina. It has its principal offices in Columbia, South Carolina. SCFBF, individually and through joint and collective efforts, seeks to promote, protect and represent the economic, social and educational interests of farmers in South Carolina. SCFBF is composed of 47 county Farm Bureau organizations with a total membership of more than 103,000 member families in South Carolina. SCFBF is a member of the AFBF.

The American Farm Bureau Federation and the South Carolina Farm Bureau Federation have a direct interest in the outcome of this case. The members of AFBF and SCFBF own or lease significant amounts of property, and depend on their land for their livelihoods. They are, therefore, vitally interested in the proper interpretation of the Just Compensation Clause of the United States Constitution. The South Carolina Supreme Court's expansion of the circumstances in which a state may effectively dispossess an owner of his or her property without paying compensation is contrary to the interests of AFBF, SCFBF, and their members.

STATEMENT

The Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just compensation." The question in this case is whether a state may totally destroy the value of a person's property by imposing land use restrictions, yet evade this constitutional obligation to pay compensation by pointing to some public harm that the regulation is intended to prevent. The South Carolina Supreme Court held that it may.

1. In 1986, petitioner David Lucas bought two undeveloped oceanfront lots in a development of single-family homes on the Isle of Palms, South Carolina. Pet. App. 33. He planned to build a home for himself and his family on one of the lots—as then permitted by South Carolina law—and to hold the other lot as an investment. Pet. App. 33, 36. Lucas paid a total of $975,000 for both lots, taking out a mortgage on which there was $495,000 principal outstanding on July 1, 1988. Pet. App. 36-37.

A subsequent amendment to South Carolina law prohibited the development of Lucas' two lots. Pet. App. 34. The Beachfront Management Act, S.C. Code Ann. § 48-39-10 *et seq.* (1988), barred the construction of any permanent structure except a walkway and small deck on the seaward side of setback lines drawn by respondent South Carolina Coastal Council (SCCC), the agency which administers the Act. Pet. App. 2, 34-35. Lucas' property lies entirely on the seaward side of the setback line. Pet. App. 35.

The land use restrictions imposed under the Beachfront Management Act were said to address the problem of erosion along the South Carolina coast's beach/dune system. Beachfront Management Act, Act No. 634, §§ 1, 2 (codified at S.C. Code Ann. §§ 48-39-250, 48-39-260 (Cum. Supp. 1990)); Pet. App. 4-8. The South Carolina General Assembly found that development close to that system had "accelerated erosion, and endangered adjacent property." *Id.* § 48-39-250(4); Pet. App. 5. It restricted such development because it found the beach/dune system to be "extremely important to the people of [South Carolina]," protecting "life and property by serving as a storm barrier,"

generating tourism, and providing a habitat for wildlife and a "natural health environment" for the state's citizens. *Id.* § 48-39-250(1); Pet. App. 4-5.

2. Petitioner filed suit against the SCCC in the South Carolina Court of Common Pleas. Lucas alleged that the Beachfront Management Act worked a taking of his property for public use for which the state was required by the Fifth Amendment to pay just compensation. Pet. App. 35.

The Court of Common Pleas held that the SCCC's actions pursuant ~~to the~~ Act had eliminated Lucas' "unrestricted right of use" of his land (Pet. App. 37) and thereby had deprived him of "the essential elements of ownership" (Pet. App. 39), infringing on "private property in the most traditional sense of the term' (Pet. App. 38). By permanently prohibiting construction on Lucas' two lots, the Court found, the SCCC "deprives Lucas of any reasonable economic use of the lots . . . and renders them valueless" (Pet. App. 37), so that "[t]he damage to the two lots by virtue of the restrictions prohibiting any form of development is total." Pet. App. 38. Because it interpreted this Court's decisions to mean "that regulatory activity by a governmental agency which denies an owner economically viable use of his land amounts to a taking under the Fifth Amendment . . . for which just compensation must be paid" (Pet. App. 40), even where the regulation "was enacted to . . . benefit . . . the general public" (Pet. App. 38), the Court of Common Pleas held it was "manifest that the imposition of the setback lines by the [SCCC] ha[s] resulted in a total taking of Lucas' two beachfront lots." Pet. App. 40. The court ordered respondent to compensate Lucas in the total amount of $1,232,387.50, calculated as the sum of the fair market value of the lots on July 1, 1988, and real property taxes and mortgage interest paid by Lucas since that date. Pet.

App. 40. In turn, Lucas was to tender a clear deed to the lots to the SCCC. Pet. App. 40-41.

3. The South Carolina Supreme Court reversed. It did not disturb the trial court's holding that the Act deprived Lucas of "private property in the most traditional sense." Pet. App. 38. A bare majority of the Court, however, held that a "nuisance-like exception" to the just compensation requirement applies (Pet. App. 12) whenever a use restriction serves to "prevent serious injury to the community" (Pet. App. 15), even though the restriction "operates to deprive a landowner of 'all economically viable use' of his property." Pet. App. 9. See also Pet. App. 11-12. Thus, because Lucas did not contest that the Beachfront Management Act "is necessary to prevent a great public harm" (Pet. App. 8), the court held that the bar on development of Lucas' property did not amount to a compensable taking.

Two members of the court dissented. They concluded, first, that the primary purpose of the Act was not to prevent a public nuisance but to eliminate "activities and effects" that could not "fairly be considered 'noxious' " (Pet. App. 27), and, second, that because the state had eliminated all "economically viable use" of Lucas' land, a taking had occurred. Pet. App. 30.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. The protection of individual property rights was a core concern of the Framers of the Constitution and the Bill of Rights. The Framers regarded it, in fact, as "the first object of government." FEDERALIST No. 10, at 78 (Madison) (C. Rossiter ed. 1961). The Fifth Amendment's Just Compensation (or Takings) Clause is one of the guarantees at the heart of the constitutional design to protect private property rights.

The South Carolina Supreme Court's decision in this case takes the clear-cut constitutional command that "private property [shall not] be taken for public use, without just compensation," and transforms it into something unrecognizable. The Framers, with the concern manifested throughout the Bill of Rights that individual rights should not mechanically be subordinated to transient legislatures' conceptions of the common good, "designed [the Just Compensation Clause] to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). For the common good, individuals might properly be forced to give up the use of their property—but only upon fair payment from the common purse. The South Carolina Supreme Court has turned this design on its head, substituting a scheme in which government must compensate an individual when it regulates so as to deprive him of his property, *except* when the taking can be broadly construed as "prevent[ing] serious injury to the community." Pet. App. 15. "[N]early every action the government takes" can be described as preventing some grave public harm, see *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 513 (1987) (Rehnquist, C.J., dissenting), so under the South Carolina Supreme Court's approach the Takings Clause would cease to impose meaningful restraints on the behavior of government officials.

2. On even the narrowest reading of this Court's takings cases, the South Carolina Supreme Court erred. Those cases do not hold that entitlement to compensation for the total regulatory destruction of land's value depends upon the objective of the regulation. On the contrary, this Court has stated repeatedly over the past seventy years that a compensable regulatory taking occurs when government destroys all economically viable use of land—regardless of government's reasons for doing so. *E.g.*, *Keystone Coal*, 480 U.S. at 485. Since the South Carolina Supreme Court did not disturb the trial court's finding that the Beachfront Management Act destroyed all the use and value of Lucas' two lots, a compensable taking occurred and the decision below must be reversed.

3. Beyond this narrow ground for decision, this Court should use the instant case to clarify the general framework of takings analysis. The South Carolina Supreme Court's expansive conception of the police powers or nuisance exception to the just compensation requirement—which finds support in some of this Court's decisions—permits incursion on property rights that was simply not contemplated by the Framers of the Fifth Amendment. This Court should expressly disapprove the view of the exception expressed below, and enunciate legal standards that better reflect the plain language and original intent of the Takings Clause and its important place in our constitutional structure.

Amici urge this Court to reject outright the notion that the absolute and unequivocal terms of the Just Compensation Clause are qualified by a police powers or nuisance exception. Nothing in the provision's history or role in our Constitution gives warrant to government to " 'inva[de] private right under the pretext of the public good.' " *United States* v. *Lynah*, 188 U.S. 445, 470 (1903) (citation omitted). Even if this Court were to recognize an exception to the just compensation requirement—which *amici* believe would be unjustified—it should call a firm halt to the erosion of the Takings Clause by making clear that any exception is limited to instances in which government regulates nuisances that involve physical invasions of others' property.

ARGUMENT

I. The South Carolina Supreme Court's Decision Should Be Reversed Because It Is Well Established That Regulatory Destruction Of All Economically Viable Use Of Property Is A Taking Regardless Of The Regulation's Purpose.

For the Framers of our Constitution and Bill of Rights, private property supplied "the clear, compelling, even defining, instance of the limits that private rights place on legitimate government." J. Nedelsky, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 9 (1990). The Framers intended the Takings Clause of the Fifth Amendment to be one of the prime guarantors of these limits. The Clause was designed to ensure that individual rights to own, occupy, and use property—and the liberty interests dependent upon these rights—could not be confiscated to serve transient legislatures' conceptions of the common good. Though government was granted the power to deprive a person of property to convert it to public use, the exercise of this power was strictly conditioned on the payment of just compensation. In this way, the Framers struck a careful balance between individual rights and community needs. See *infra* Part II.B.

For this reason, this Court has never wavered from the position that total regulatory deprivation of the use and value of a person's land—such as the trial court explicitly found had occurred in this case—is always a compensable taking. See *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295-296 (1981) ("A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land . . . .' "), quoting *Agins* v. *Tiburon*, 447 U.S. 255, 260 (1980). Accord *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 316-317 (1987); *United States* v. *General Motors Corp.*, 323 U.S.

373, 378 (1945); *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922) ("while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking").

A state that destroys the value of a person's land has never been permitted to evade its constitutional obligation to compensate by pointing to the public purpose of its regulation, even if that purpose is to prevent serious harm to the community.[1] This Court has carefully stated and applied its regulatory takings analysis in the disjunctive: "land use regulation can effect a taking if it 'does not substantially advance legitimate state interests, . . . *or denies an owner economically viable use of his land.*' " *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 485 (1987), quoting *Agins*, 447 U.S. at 260 (emphasis added). See also *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Hodel* v. *Irving*, 481 U.S. 704, 716-718 (1987); *Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 127 (1978); *Hudson Water Co.* v. *McCarter*, 209 U.S. 349, 355 (1908). In *Keystone Coal*, for example, the restriction on mining at issue was designed to "abate activity akin to a public nuisance" and thereby protect the public health and welfare. 480 U.S. at 488. This Court nevertheless declined to hold that no taking had occurred until it had determined that there was no evidence the regulation destroyed the profitability of even one of Keystone's mines, but at most required Keystone to leave 2 per cent of its coal in the ground. *Id.* at 485, 495-496. See also *Penn Central*, 438 U.S. at 135-137.

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[1] The Takings Clause has been applied to the states through the Fourteenth Amendment since *Chicago, B. & Q. R.R.* v. *Chicago*, 166 U.S. 226 (1897).

Any other approach would be inconsistent with a principled approach to takings jurisprudence. Government's physical occupation of land is almost invariably held to be a compensable exercise of the power of eminent domain, whatever the purpose of the taking. See *Keystone Coal*, 480 U.S. at 488 n.18. When government instead entirely destroys the value of land by regulation, the economic effect and impact on the owner's liberty are indistinguishable. See *Williamson Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 185 (1985). *Cf. United States* v. *Lynah*, 188 U.S. 445, 470 (1903) (when government "takes away the use and value" of land, "it is of little consequence in whom the fee may be vested"; there is a taking even though the government does not "appropriate the title").

The South Carolina Supreme Court's reliance on *Mugler* v. *Kansas*, 123 U.S. 623 (1887), and its progeny is inapposite. Pet. App. 10. *Mugler* itself preceded this Court's holding that regulation can work a taking (in *Pennsylvania Coal* v. *Mahon*) by more than 30 years. The other cases rejecting takings claims that were relied upon below uniformly concerned police power regulations that did not totally destroy the value of property. See *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915) (87½ per cent diminution in value); *Miller* v. *Schoene*, 276 U.S. 272 (1928) (regulation required destruction only of ornamental cedar trees on property); *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594 (1962) (no evidence "which even remotely suggests that [the regulation] will reduce the value of the lot in question").

This Court's cases thus firmly stand for the proposition that government may not achieve its goals, however laudable, by the "complete extinction of the value of a parcel of property" unless it pays just compensation for the taking. *Keystone Coal*, 480 U.S. at 513 (Rehnquist, C.J., dissenting). The value and use of petitioner's two lots was totally destroyed by the Beachfront Management Act, the Court of Common Pleas found (Pet. App. 37-38, 40), and the judgment below must accordingly be reversed.[2]

II. The Takings Clause Should Be Interpreted To Require Just Compensation For All Regulatory Deprivations Of Property.

In addition to erroneously concluding that the government may destroy *all* economically viable use of land without paying just compensation, the South Carolina Supreme Court relied in this case on an expansive police powers or nuisance exception to the just compensation requirement. Although its view of this exception finds support in some of this Court's decisions, *amici* believe this interpretation of the Takings Clause is untenable and highly damaging to the security and predictability of the property interests the Framers intended to protect. We urge this Court to step back from some of its prior statements about the broad scope of the police powers or nuisance exception, and to give the Just Compensation Clause

[2] The SCCC argued in its brief in opposition at the petition stage that this Court should not reach the merits of petitioner's claim because petitioner had not exhausted his administrative remedies by applying for a variance. Br. in Opp. at 5. This argument has no merit. The Court of Common Pleas made a binding state law determination—neither disturbed nor questioned by the South Carolina Supreme Court—that a remand for further administrative proceedings would not have been proper. Pet. App. 39. The SCCC asserts that under 1990 amendments to the Beachfront Management Act, landowners like Lucas may be able to obtain a special permit in some instances to build seaward of the setback line. See S.C. Code Ann. § 48-39-290(D) (Cum. Supp. 1990). Whatever the effect of these amendments, it is clear that Lucas could not have benefited from them between 1988 and 1990. See *First English Evangelical Lutheran Church*, 482 U.S. at 318 (" 'temporary' takings which . . . deny a landowner all use of his property, are not different in kind from permanent takings").

a place in our constitutional order in keeping with its text, history and purpose.[3]

A. The South Carolina Supreme Court Construed The Police Powers Or Nuisance Exception So Broadly As To Eviscerate The Requirement Of Just Compensation For Regulatory Takings.

The South Carolina Supreme Court held that the state's prohibition on development of petitioner's oceanfront lots fell within a "nuisance-like exception" to the just compensation requirement because the state had found that the restriction served to "prevent serious injury to the community." Pet. App. 12-15. The restriction was intended to prevent or slow erosion of a beach/dune system that the state legislature found protected life and property by acting as a storm barrier, generated tourism, and provided habitat for wildlife and a recreation area for South Carolina residents and visitors. Pet. App. 4-5.

As four members of this Court remarked in *Keystone Coal*, "nearly every action the government takes" can be

[3] Our belief that this Court should clarify elements of its takings jurisprudence is shared by leading commentators with widely divergent views of the Clause. There is general agreement that this Court's decisions in this area have been confused and contradictory. See, *e.g.*, Epstein, *Takings: Descent and Resurrection*, 1987 SUP. CT. REV. 1, 4; Rose, *Mahon Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984); Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 1002-1003 (1982); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1170-1171 (1967); Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 37 (1964). See also *Nollan*, 483 U.S. at 866, 867 (Stevens, J., dissenting) ("Even the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence," so that "land-use planners" are "left guessing about how the Court will react to the next case, and the one after that").

described as preventing some grave public harm. 480 U.S. at 513 (Rehnquist, C.J., dissenting). Indeed, this case amply illustrates the extreme malleability of a "nuisance-like exception" triggered by any government action said to prevent serious public harm. As the dissenting Justices noted below, the Beachfront Management Act's primary goal is plainly to bring benefits to the state by "promoting tourism, creating a habitat for indigenous flora and fauna, creating a place which harbors natural beauty, and providing a barrier and buffer from high tides, storm surge, hurricanes and normal erosion"—none of which "can fairly be said to resemble a nuisance." Pet. App. 27. It is clear that, as a practical matter, the South Carolina Supreme Court's standard for reviewing regulatory deprivations of property imposes no meaningful restraint on government officials.

The South Carolina Supreme Court's view of the scope of a "nuisance-like exception" nevertheless finds support in some of this Court's pronouncements in regulatory takings cases. One articulation of the test for a regulatory taking is that, except when it denies an owner all economically viable use of his land, a regulation will be considered a taking only if it "does not substantially advance legitimate state interests." *Agins*, 447 U.S. at 260. See also, *e.g.*, *Nollan*, 483 U.S. at 834; *Keystone Coal*, 480 U.S. at 485. In another articulation that may appear to give the test more bite, this Court asks whether the state is restraining uses "that are tantamount to public nuisances." *Keystone Coal*, 480 U.S. at 491. It seems doubtful, however, whether many exercises of a state's police power will be held to require compensation if the test in either of these current formulations is applied. The term "nuisance" has meant "all things to all people" (W. Prosser & W. Keeton, THE LAW OF TORTS 616 (5th ed. 1984)), and public nuisances have been broadly defined to include

any interference with the community's health, safety, morals, comfort or convenience. *Id.* at 644. In consequence, the Court's "nuisance" exception has become all encompassing in cases where a regulatory restriction leaves any value in an owner's property, and the Court has upheld regulations destructive of property rights where the goal of regulation has been "to protect the public interest in health, the environment, and the fiscal integrity of [an] area" (*Keystone Coal*, 480 U.S. at 488), to promote a community's "health, safety, morals, or general welfare" (*Penn Central*, 438 U.S. at 125), or where restrictions are "reasonably related to the implementation of a policy . . . expected to produce a widespread public benefit." *Id.* at 133 n.30.

In these circumstances, this exception to the just compensation requirement is more aptly labeled a "police powers" than a "nuisance" exception. Despite this Court's insistence that the nuisance exception is *not* coterminous with the police power (*Keystone Coal*, 480 U.S. at 491 n.20), it is difficult to imagine any regulatory diversion of property rights to public use that could not be said to address a "nuisance" as this Court has defined the term for purposes of this exception. See Epstein, 1987 SUP. CT. REV. at 21. The Court has held that a wide variety of regulatory deprivations of property did not require compensation because they were designed to prevent a "nuisance," including laws or regulatory decisions prohibiting existing breweries from manufacturing alcoholic beverages (*Mugler*, 123 U.S. 623); prohibiting an existing brick works from manufacturing bricks, in order to further the health and comfort of the community (*Hadacheck*, 239 U.S. 394); requiring the destruction of ornamental cedar trees harboring a plant disease that threatened nearby apple trees (*Miller*, 276 U.S. 272); and requiring that mine owners leave coal in the ground to support surface areas, though they had previously bought from the surface owners their right to any support estate. *Keystone Coal*, 480 U.S. 470. In other cases, this Court has even gone so far as to abandon any mention of "nuisance," upholding uncompensated takings merely because they amounted to exercises of the police power. *Penn Central*, 438 U.S. 104 (depriving owners of landmark building from uses of their air rights); *Andrus* v. *Allard*, 444 U.S. 51 (1979) (prohibiting sale of pre-existing parts of endangered birds); *Goldblatt*, 369 U.S. 590 (prohibiting the mining of an existing gravel pit below the water table). But see *Christy* v. *Lujan*, 490 U.S. 1114, 1116 (1989) (White, J., dissenting from denial of certiorari) (though "sustaining grizzly bears is a worthwhile and important governmental objective," a statute prohibiting a person from killing bears that are destroying his livestock may "den[y] the Fifth Amendment's protection against uncompensated takings").

The breadth that this Court has given to the nuisance or police powers exception—and that the South Carolina Supreme Court gave it in this case—is unwarranted in light of the history, explicit text, and central constitutional role of the Takings Clause.[4] Indeed, recognition of so ex-

[4] This Court has developed a second exception to the requirement of compensation for a partial regulatory taking where restrictions "secure[] an average reciprocity of advantage." *Pennsylvania Coal*, 260 U.S. at 415. This exception—really a recognition that compensation may be in kind, provided it is "just" (see R. Epstein, TAKINGS 195-196 (1985))—applies when the regulatory "burden is shared relatively evenly and it is reasonable to conclude that on the whole an individual who is harmed by one aspect of the [regulation] will be benefited by another." *Penn Central*, 438 U.S. at 147 (Rehnquist, J., dissenting). See *Hodel* v. *Irving*, 481 U.S. at 715-716. It pertains most obviously to traditional zoning regulations. See *Agins*, 447 U.S. 255; *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926). The "average reciprocity of advantage" exception is not at issue in this case. Although the Court in

(Footnote continued on following page)

pansive an exception has effectively interpreted the Takings Clause out of the Constitution as an independent safeguard against regulatory deprivations. Under current doctrine it has become largely duplicative of lower-tier due process protection. This Court should heed the warning given by Justice Holmes, speaking for the Court in *Pennsylvania Coal*, against the very expansion of the exception that has occurred:

> "When th[e] seemingly absolute protection [of the Just Compensation Clause] is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States." 260 U.S. at 415.

B. The Text, History, And Constitutional Role Of The Just Compensation Clause Are Inconsistent With The Recognition Of Any Police Powers Or Nuisance Exception.

The text of the Takings Clause is unambiguous, mandating that "private property [shall not] be taken for public use, without just compensation." While *amici* recognize that courts may face problems in applying even such plain language to some marginal situations, the Clause's four operative concepts ("private property"; "taken"; "public use"; and "just compensation") are unusually clear, especially as applied to the facts of this case. A person's use of his land is at the very core of the meaning of "private property." See *General Motors Corp.*, 323 U.S. at

[4] *continued*
Keystone Coal tentatively suggested that a nuisance exception to the just compensation rule "is consistent with the notion of 'reciprocity of advantage' " (480 U.S. at 491), historically the two exceptions have been treated as quite distinct, as the just-cited passages in *Pennsylvania Coal*, *Penn Central*, and *Irving* illustrate.

378 ("private property" encompasses not just land as a physical thing, but the bundle of rights "to possess, use and dispose of" the land); *Hodel* v. *Irving*, 481 U.S. at 716-718 (abolition of descent and devise of land a taking). Thus, as the Court of Common Pleas held, the bar on development at issue in this case eliminated "essential elements of ownership" (Pet. App. 39) and deprived Lucas of "private property in the most traditional sense of the term" (Pet. App. 38). In its literal sense, the word "taken" certainly comprehends the diminution of the value of land by regulation, as this Court's entire regulatory takings jurisprudence affirms. See *Penn Central*, 438 U.S. at 143-144 (Rehnquist, J., dissenting). *Cf. Dugan* v. *Rank*, 372 U.S. 609, 625 (1963).[5] This Court has also given a plain reading to the limitation that government takings must be for "public use," holding that the power to take is as broad as the police power. *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1014 (1984). The Court has found the concept of "just compensation" similarly clear. See *Dugan*, 372 U.S. at 624-625 (compensation is measured by the extent of the deprivation of property, *i.e.*, "the difference in market value of the [property] before and after the . . . taking").

The language of the Takings Clause is therefore plain, and it admits of no exception. Although government may

[5] Madison's initial proposal, that "[n]o person shall be . . . obliged to relinquish his property . . . for public use, without a just compensation," could perhaps more easily have been construed to be limited to physical deprivations of property. *Speech Proposing the Bill of Rights*, 12 THE PAPERS OF JAMES MADISON 201 (C. Hobson & R. Rutland eds. 1979). The substitution of the more expansive command that property shall not be "taken" requires the application of the Fifth Amendment to regulatory deprivations of property. See generally Michelman, 80 HARV. L. REV. at 1186-1187 ("Wordplay . . . cannot justify any sharp line of distinction between governmental encroachments which take the different forms of affirmative occupancy and negative restraint").

deprive a person of his property in order to put it to public use, government's right to do so is conditioned on the payment of just compensation. Given the explicit command of the text, the creation of *any* nuisance or police powers exception is illegitimate.

The Takings Clause's history and constitutional role likewise indicate that there should be no nuisance or police powers exception to the Clause. The payment of compensation when government took private property to serve the common good was "a principle of the common law . . . of immemorial usage" (Stoebuck, *A General Theory of Eminent Domain*, 47 WASH. L. REV. 553, 583 (1972)), and the continued "protection of private property was a nearly unanimous intention among the founding generation." McConnell, *Contract Rights and Property Rights: A Case Study in the Relationship Between Individual Liberties and Constitutional Structure*, 76 CAL. L. REV. 267, 270 (1988). See generally J. Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 510-511 (R. Rotunda & J. Nowak eds. 1987). There is no indication that the Framers thought a broad swathe cut through the middle of this principle entitled government to take property without compensation where it appeared this would benefit the general public welfare.[6]

On the contrary, the deterioration of the nuisance exception into a constitutional loophole for property-destroying

[6] It appears that the only exception consistently recognized at common law—one standing "as much upon tradition as upon principle" (*Pennsylvania Coal*, 260 U.S. at 416)—was for the exercise of royal prerogative power to destroy property in the path of a fire in order to prevent immediate harm to others. See *id.* at 415; *Bowditch* v. *Boston*, 101 U.S. 16 (1879); W. Stoebuck, NONTRESPASSORY TAKINGS IN EMINENT DOMAIN 196 (1977). *Cf. United States* v. *Caltex, Inc.*, 344 U.S. 149, 156 (1952) ("destruction of respondents' terminals by a trained team of engineers in the face of their impending seizure by the enemy").

regulations that merely advance "legitimate state interests" (*Keystone Coal*, 480 U.S. at 485) is wholly inconsistent with the historical purpose of the Clause. The Framers of the Constitution and Bill of Rights regarded the protection of individual property rights as "the first object of government" (FEDERALIST No. 10, at 78 (Madison) (C. Rossiter ed. 1961)), and would have been shocked at the notion that the Takings Clause requires little more than lower-tier due process scrutiny. "Government," James Madison wrote, "is instituted no less for protection of the property than of the persons of individuals." *Id.*, FEDERALIST No. 54, at 339. The Fifth Amendment's Just Compensation Clause lies at the very heart of this protection.

The Takings Clause was one of a series of protections in the Bill of Rights guarding the individual from arbitrary or oppressive actions of transitory political majorities. The Clause disciplines government by forcing it to weigh the benefits to the community of depriving a person of his property against the constitutionally-mandated compensation that would have to be paid for the taking. Property could always be taken for the common good—but only if government were prepared to pay compensation out of the common purse. Hence the distrust of government underlying our constitutional structure of separated powers and checks and balances and our Bill of Rights can clearly be seen at work in the Takings Clause, which imposes a taxpayer burden to check the excess zeal of property-envious communities. The Takings Clause, moreover, requires the government to treat individuals with dignity by ensuring that, if government takes the individual's property, it must compensate him for that significant intrusion.

Finding " 'no warrant in the laws or practices of our ancestors' " for governmental " 'authority [to] inva[de] pri-

vate right under the pretext of the public good' " (*United States* v. *Lynah*, 188 U.S. at 470 (citation omitted)), this Court has long recognized that the purpose of the Takings Clause was to shield individual rights from government action that would convert one man's property to community use. See *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960) (the Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"); *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 325 (1893) (the Clause "prevents the public from loading upon one individual more than his just share of the burdens of government"). The nuisance or police powers exception to the just compensation requirement—explained with the slogan that "[t]here must be progress, and if in its march private interests are in the way, they must yield to the good of the community" (*Hadacheck*, 239 U.S. at 410)—is inconsistent with this purpose. The teaching of the Takings Clause is that where "progress" is achieved by depriving individuals of property, the costs "must be borne by all [a community's] taxpayers [and not] imposed entirely on the owners of the individual properties." *Penn Central*, 438 U.S. at 139 (Rehnquist, J., dissenting). The cardinal principle that should guide interpretation of the Takings Clause is that government may *not* sacrifice the property interests of some to benefit others: "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of *paying for the change*." *Pennsylvania Coal*, 260 U.S. at 416 (emphasis added). See also *Nollan*, 483 U.S. at 841-842.

Support for a nuisance or police powers exception to the just compensation rule is to be found in neither the plain language nor the structural role of the Takings Clause

in our constitutional scheme. We urge this Court to hold that there is no such exception.

C. Any Nuisance Exception Should Be Limited To Circumstances In Which Government Regulates To Prevent Harmful And Direct Physical Invasions Of Other Owners' Property.

In light of the text, history, and constitutional role of the Just Compensation Clause, *amici* question whether any exception to the Clause's mandate can be justified. The Framers cannot have intended this Court to create an exception to a specific constitutional provision unambiguously commanding that compensation be paid for a taking. Any exception would derogate from the original purpose of the Clause to inhibit takings and prevent their use to redistribute property from individuals to the community at large.

Nevertheless, *amici* recognize that the Clause "has not always been read literally" (*Penn Central*, 438 U.S. at 142 (Rehnquist, J., dissenting)), and that a nuisance or police powers exception may find support in some of this Court's cases. If this Court is not prepared to abandon the exception entirely and return to the original meaning of the Takings Clause, it should at least construe the exception much less expansively than did the South Carolina Supreme Court.

A broad police power exception would make a mockery of the Fifth Amendment's just compensation dictate, as we have already explained, reducing it to a mirror image of due process and a shadow of its intended role as an independent and stringent limitation on the way government may treat its citizens. See *supra* Part II.A. It would be no more acceptable to ground an exception in state nuisance law. The law of private nuisance is "the least systematic area of the tort law" and a "dumping ground"

for actions that "do not neatly fit into any recognized doctrinal niche." Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 49 (1979). The law of public nuisance is even more uncertain and incoherent, with states able to label most any private action lying within the police power as a public nuisance. W. Prosser & W. Keeton, THE LAW OF TORTS 643-645. It cannot be that the scope of the Takings Clause's protection of individual property rights is subject to the vagaries of state private or public nuisance law, and that the level of protection varies according to the jurisdiction in which an aggrieved owner finds himself. That would in effect make "the just compensation requirement . . . legislative instead of constitutional." R. Epstein, TAKINGS 115. As four members of this Court recognized in *Keystone Coal*, the contours of any exception to the mandate of the Just Compensation Clause must be "a question of federal, rather than state, law, subject to independent scrutiny by this Court." 480 U.S. at 512 (Rehnquist, C.J., dissenting).

If the Framers' intentions are not to be wholly thwarted, any reasonable nuisance exception to government's obligation to pay compensation for deprivations of property occasioned by its land-use restrictions would have to be limited to regulations that advance the "discrete and narrow purpos[e]" (*id.* at 513) of prohibiting an owner "from using its property in a narrow set of noxious ways." *Penn Central*, 438 U.S. at 146 (Rehnquist, J., dissenting). *Amici* submit that the nuisance exception—if there is one—should encompass only regulations preventing uses that involve direct physical invasions of other owners' property. See generally R. Epstein, TAKINGS 107-125.[7]

[7] The issue in this case is whether government may immunize itself from the just compensation requirement by regulating with

(Footnote continued on following page)

The results of some of this Court's leading regulatory takings decisions can be explained by a nuisance exception limited in this manner. There was clear evidence of such a nuisance in *Hadacheck*, for example, where "fumes, gases, smoke, soot, steam and dust" had escaped petitioner's brick-making plant and had "caused sickness and serious discomfort to those living in the vicinity." 239 U.S. at 408. Similarly, in *Miller* v. *Schoene* a fungal plant disease was physically transmitted across property boundaries, being "communicated by spores" from a landowner's cedar trees to his neighbors' apple trees. 276 U.S. at 278. *Cf. Fertilizing Co.* v. *Hyde Park*, 97 U.S. 659 (1878) (uphold-

[7] *continued*

certain ends in mind. There is no question here about the proper standard for evaluating the means by which government chooses to further its ends. Any nuisance exception, however, must include standards for evaluating both government's goals and its means of achieving them.

In *Nollan*, 483 U.S. at 834-835 & n.3, this Court indicated that the appropriate inquiry as to means is whether a land use regulation "substantially advances" the state's interest, suggesting an intermediate level of scrutiny. But *Curtin* v. *Benson*, 222 U.S. 78 (1911), suggests the inquiry should be more stringent: whether a land use regulation is narrowly tailored to achieve the government's interest. In *Curtin*, the United States had prevented an owner of unfenced land within a national park from grazing his cattle upon his property, as a means of preventing the cattle from wandering onto government-owned land. This Court held that the government could not regulate away such "essential uses of private property." *Id.* at 86. To ensure "that no injury could result to others," the United States might require that an owner fence his property to prevent "the trespass of his cattle on other lands," or it might simply prohibit such trespasses. *Ibid.* But it could not constitutionally seek to prevent injury by denying the owner use of his grazing lands.

A demanding analysis of the connection between a regulation and the state interest, comparable to that used in assessing invasions of other fundamental rights, would seem to be in keeping with the importance the Framers' attached to the protection of property rights, and to the centrality of property rights, as a practical matter, in individual lives and in our polity.

ing ordinance abridging prior charter to transport waste through streets, where restriction necessary to eliminate noxious odors, disease transmission, and infestations by insects). *Keystone Coal*, 480 U.S. 470, may also be explained using this nuisance test, for the removal of the support estate would have directly caused the collapse of the surface, which might be regarded as a physical invasion.[8]

While at odds with the Framers' intent that compensation *always* be paid for deprivations of property, a physical invasion exception does provide a measure of protection to an individual's enjoyment of his own property. The test allows every owner to do what he will with his own property—without fear of uncompensated regulatory interference—provided that his acts do not invade another owner's property and hence *that* owner's right to make what use he chooses of *his* property.

A physical invasion test also has a fair doctrinal foundation. Private nuisances traditionally "are invasions of the plaintiff's property that fall short of trespasses but which still interfere in the use and enjoyment of land." Epstein, 8 J. LEGAL STUD. at 53. See, *e.g.*, *Morgan* v. *High Penn Oil Co.*, 238 N.C. 185, 193, 77 S.E.2d 682, 689 (1953). This test thus captures the essence of traditional private nuisance law, free of the accretions that have come with nuisance law's role as a repository for actions in search of a label.

[8] *Amici* concede that not all this Court's cases can be explained in this manner. The decision in *Mugler*, 123 U.S. 623, however, preceded the development of regulatory takings jurisprudence by many years; and this Court has recently cast doubt on the continuing vitality of *Goldblatt*, 369 U.S. 590. See *Nollan*, 483 U.S. at 835 n.3 (criticizing *Goldblatt* because it appears to assume that "the standards for takings challenges, due process challenges, and equal protection challenges are identical"). *Penn Central* and *Andrus* cannot be explained as physical invasion cases.

Moreover, because a physical invasion test turns on the existence "of a natural state of affairs" (Epstein, 8 J. LEGAL STUD. at 53)—hence on indicia that will often be objectively determinable—it would be relatively simple to administer. Property owners and government planners would have clear guidance regarding the circumstances in which land-use regulation will give rise to a constitutional duty to compensate. Given modern-day pressures on the public fisc, this sort of foreknowledge of whether a particular regulation is likely to effect a compensable taking is of obvious benefit to government. Under current law, however, with its lack of "any 'set formula' for determining when 'justice and fairness' " require compensation and its reliance on "ad hoc, factual inquiries" (*Penn Central*, 438 U.S. at 124), considerable uncertainty about whether land use regulation will be held a taking is inevitable. See, *e.g.*, *Executive Order No. 12630*, 53 FED. REG. 8859 (March 18, 1988).

Applied to the facts of this case, this nuisance exception would require reversal of the South Carolina Supreme Court's decision. The South Carolina legislature and SCCC found that building on lots seaward of the setback line would cause the natural process of erosion to accelerate or change so as to put persons and property at risk from the ocean. No physically invasive act of the owners of such lots is claimed to cause harm: buildings on oceanside lots, in and of themselves, would be "harmless enough." *Bryant* v. *Lefever*, 4 C.P.D. 172 (1878-1879), as quoted in Epstein, 8 J. LEGAL STUD. at 58. It is the forces of nature that would be the direct and only physically invasive cause of any damage to persons or property.

Finally, though petitioner has not challenged South Carolina's justification for the Beachfront Management Act as being necessary to protect life and property in an economical and effective manner (Pet. App. 4), it is clear

that no imminent public health emergency would be threatened by building single family houses on Lucas' lots—which have existing homes on either side (Pet. App. 36). The Act cannot plausibly be viewed as an emergency public health measure, but is an example of an everyday, long-term, public policy determination, as the dissenters below recognized (Pet. App. 27).

If the state wishes to protect the property of other owners, and preserve the integrity of the beach/dune system for purposes like tourism and recreation, it cannot do so by taking Lucas' property without compensation. Redistributing existing property rights to serve these purposes is a project that can only be undertaken out of the public purse.

CONCLUSION

The judgment of the South Carolina Supreme Court should be reversed.

Respectfully submitted,

JOHN J. RADEMACHER
General Counsel
RICHARD L. KRAUSE
Assistant Counsel
AMERICAN FARM BUREAU FEDERATION
225 Touhy Avenue
Park Ridge, Illinois 60068
(708) 399-5700

JAMES D. HOLZHAUER
Counsel of Record
MICHAEL F. ROSENBLUM
CLIFFORD M. SLOAN
TIMOTHY S. BISHOP
MAYER, BROWN & PLATT
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

Counsel for Amici Curiae

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No. 91-453

IN THE
United States Supreme Court
October Term, 1991

David H. Lucas,

Petitioner,

v.

South Carolina Coastal Council,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

BRIEF OF *AMICUS CURIAE* THE NEMOURS FOUNDATION, INC. IN SUPPORT OF PETITIONER

JOHN J. MULLENHOLZ

MULLENHOLZ & BRIMSEK
1150 Connecticut Avenue, N.W.
Suite 700
Washington, D.C. 20036
(202) 296-8000

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37.3, The Nemours Foundation, Inc., files this brief as Amicus Curiae in support of Petitioner. Letters of consent from counsel for the parties have been filed with the Clerk.

The Nemours Foundation, a hospital foundation, is the major beneficiary of the Alfred I. duPont Testamentary Trust and the estate of Mr. duPont's business associate and brother-in-law, Edward Ball. In their wills, Mr. duPont and Mr. Ball sought to provide perpetual medical care for sick and handicapped children and the impoverished elderly. To carry out their wishes, the Foundation operates three major health care facilities:

- **The Alfred I. duPont Institute** - a multi-specialty children's hospital in Wilmington, Delaware.

- **The Nemours Children's Clinic** - an outpatient pediatric subspecialty care center in Jacksonville, Florida.

- **The Nemours Health Clinic** - an outpatient center, also located in Wilmington, for the elderly in Delaware.

The statistics contained in the 1990 Annual Report of the Foundation underscore the tens of thousands of American children and elderly who benefit from the work of these facilities. During 1990, the medical staff at the Alfred I. duPont Institute performed 4,392 surgical procedures on sick and handicapped children in the course of managing 2,697 inpatients and over 48,000 clinic and outpatient visits. Their colleagues at The Nemours Children's Clinic had more than 63,000 clinic and outpatient visits. Finally, the elderly made in excess of 62,000 visits to the health care providers working through The Nemours Health Clinic, including 11,396 dental visits, 4,544 audiology visits, and 10,938 eye visits, and received more than 100,000 pharmacy prescriptions.

The medical professionals affiliated with the Foundation's three health-care facilities also engage in extensive medical research activities and have been responsible for numerous treatment innovations. One of these is the rural health care program established by The Nemours Children's Clinic. It involves the coordination of several "satellite clinics" with the Clinic's main facility in Jacksonville to bring primary pediatric care to children in remote areas throughout the State of Florida who might otherwise not have access to a pediatrician.

As the major source of funding for The Nemours Foundation, the Alfred I. duPont Testamentary Trust is one of the largest concentrations of assets in America designated primarily for health care. The Trust's chief asset is its controlling interest in the St. Joe Paper Company.

Operating primarily in the State of Florida, the St. Joe Paper Company and its subsidiaries (the Company) are engaged in five principal lines of business:

- **Forest Products** - the integrated production of corrugated containers, including the cultivation and harvesting of pulpwood and the manufacture of linerboard;

- **Transportation** - the operation of two railroads within the State of Florida;

- **Real Estate** - the ownership, management, and development of real estate;

- **Sugar** - the production of raw sugar, including the cultivation, harvesting, and processing of sugar cane; and

- **Communications** - the provision of telephone services and telecommunications equipment.

The Company owns approximately 1.1 million acres of real property in the State of Florida, or approximately 3% of the land area of the State. Most of this land was purchased in the 1920's and 1930's to provide funding for the Trust and its beneficiary, The Nemours Foundation. The Company is the largest private landowner in Florida. It owns very large tracts in some areas, including 225,289 acres or 63% of Gulf County, Florida, and 197,099 acres or 41% of Bay County, Florida.

A substantial portion of the Company's real property is raw land encompassing wetlands and coastal areas. For example, the Company owns approximately 185 miles of frontage along rivers, bays, major lakes, and ocean beaches in Florida, including almost 65 miles of nearly contiguous bay shoreline. The use of portions of its property has been regulated increasingly in recent years because of possible or perceived impact upon wetlands, coastal areas, and the natural habitats of various wildlife species.

Thus, because earnings from the Company ultimately sustain its medical programs for children and the elderly, The Nemours Foundation is directly and significantly affected by the extensive and evolving local, state, and Federal regulation of the Company's use of its land. Even prohibitions on using small discrete segments of larger parcels can have a substantial cumulative effect on the earnings of the Company and

therefore the funding of the Foundation's medical programs. This is especially true in light of the continuing escalation of health care costs in the United States.

The Nemours Foundation's situation forcefully illustrates the sweeping impact of land use and environmental regulation. It reveals the surprising identity of those who could be forced to bear the burden of that regulation. It is not always large corporate or wealthy landowners. Indeed, it may be the sick and handicapped children and the impoverished elderly who, in this instance, are the Foundation's beneficiaries.

The Nemours Foundation is concerned that, if allowed to stand, the South Carolina Supreme Court's decision will exacerbate the problems of landowners. The Foundation is already confronted by restrictive land use and environmental statutes and regulations in Florida.

REGULATORY POLICIES IN FLORIDA

Florida landowners are subject to a variety of local, state, and Federal land use restrictions.[1] Under Florida's Local Government Comprehensive Planning and Land Development Regulation Act, Fla. Stat. Ann. §§ 163.3161-3243 (Harrison 1989), municipalities and counties are required, individually or jointly, to develop comprehensive land use plans covering residential, commercial, industrial,

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[1] The growth of regulatory restrictions is traced in pertinent cases. *See generally Graham v. Estuary Properties, Inc.*, 399 So.2d 1374 (Fla. 1981); *McNulty v. Town of Indialantic*, 727 F. Supp. 604 (M.D. Fla. 1989).

agricultural, recreational, conservation, transportation, and other public uses. The provisions of the Act are deemed to be the *minimum* requirements. *Id.* § 163.3161. The comprehensive plans must also address water, soil, coastal (including beach access), historical, scenic and wildlife conservation issues. *Id.* § 163.3177. While intended to advance public policy, a comprehensive plan mandating public housing or open space where the landowner envisioned a commercial development impinges on the landowner's ability to obtain any economic return from the land. From a practical standpoint, landowners may have to comply with varying requirements in each municipality or county in which they own land. Landowners are also affected by concurrency requirements that bar development unless and until adequate supporting infrastructure is in place. *Id.* § 163.317(10)(h). If the local infrastructure is inadequate, the landowner must either wait until it has been upgraded or provide all of the improvements at its own expense.

Florida Administrative Code Rule 9J-5 makes it difficult for landowners to make long-range plans. Fla. Admin. Code Ann. r. 9J-5 (1990). The Rule permits amendment of the comprehensive plan twice during any calendar year. Thus, the landowner faces a moving target against which he must develop long-range options. The Rule specifically calls for policies to protect "native vegetative communities" and endangered and threatened wildlife. As will be discussed below, such requirements can render land commercially useless.

Even if a Florida landowner can leap the local comprehensive plan hurdle, he may also be subject to additional requirements if his proposed development has a "substantial impact" upon more than one county. Fla. Stat.

Ann. § 380.06 (Harrison 1987 & Supp. 1989 & 1990). In addition to satisfying other requirements, landowners may be required to contribute land or build public facilities in order to win approval of a development plan. Fla. Admin. Code Ann. r. 9J-2 (1990). Approval of development may be denied if the authorities find that it would significantly impact endangered, threatened, and special concern plants and animals, beaches, dunes, etc. *Id.* r. 9J-2.0185(3)(c).

Construction in coastal areas is subject to even greater restrictions. Florida Statutes Chapter 161.053 directs the Florida Department of Natural Resources to establish restrictive coastal construction control lines in each county according to the portion of the beach-dune system subject to severe fluctuations, based on a 100-year established storm surge line. Approval of construction seaward of the control line is conditioned upon a number of factors, including the potential impact of the construction on the beach-dune system, protection of sea turtles, salt-resistant vegetation, and endangered plant communities. The developer may be required to provide alternate access. The statute also prohibits construction seaward of the seasonal 30 year high-water line.

By way of comparison, South Carolina's Beachfront Management Act, S.C. Code Ann. §§ 48-39-10 to 48-39-360 (Law. Co-op. 1987 & Supp. 1990), established a baseline and a setback based upon predicted erosion over forty years. *Id.* § 48-39-280. That Act limits construction or reconstruction seaward of the baseline to narrow walkways, small wooden decks, etc. Construction, reconstruction, or alteration of structures between the baseline and the setback is restricted. *Id.* § 48-39-290.

Permitting of activities in wetlands is governed separately by Florida Statutes Chapter 403.91. Before granting a permit, the authorities will, among other things, consider the impact of the proposed activity on fish, wildlife, and their habitats. *Id.* § 403.918. Where wetlands are protected, the State has encouraged municipalities and counties to include buffer zones in their comprehensive land use plans. The Company has experienced demands of buffers of approximately seventy-five feet around wetland and coastal areas.

Landowners face costly disruption when their development plans do not conform with local or regional plans or when they are required to contribute land or facilities. Habitat preservation is potentially an even greater problem. The Company has already been required to preserve habitat for eight species of plants and animals.

Frequently, the rules and regulations regarding activities permitted or prohibited in certain habitats, such as wetlands, or areas where endangered or threatened wildlife exist, are not exact. For example, the Federal Endangered Species Act, 16 U.S.C.A. §§ 1531-1544 (West 1985), protects species which are in danger of extinction. Federal agencies may develop guidelines regarding development or use of critical habitats or areas where endangered species are found, but oftentimes decisions are made on a case-by-case basis. Where use is not banned outright, permits must be obtained, a difficult or frequently impossible task.[2] If permits are issued, use or development of the land is often restricted, or

[2] *See, e.g., Ciampitti v. United States*, 22 Cl. Ct. 310 (1991); *Florida Rock Industries, Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986).

a portion of the land is set aside, as a condition of obtaining the necessary approvals.

Proposed Florida regulations would mandate stringent onsite and/or offsite preservation and, in some cases buffers, for a variety of animals and plants. For example, the pending Upland Vegetation and Wildlife Policy rule would require 100% onsite habitat preservation for an endangered species; 30% onsite, and 60% offsite preservation for certain threatened animals and preservation of nests along with a 500-foot buffer and forage area for certain threatened birds.[3] An analysis of the draft rule suggests that, if adopted, the regulation could affect one million acres of developable land.

Another prime example is the draft Gopher Tortoise Incidental Take Rule,[4] which would require an "incidental take permit" before land could be subdivided or developed if there were as few as ten gopher tortoise burrows located on five acres of land in South Florida or 20 acres in North Florida.[5] The landowner would have to provide a 50-foot buffer (0.18 acre) for each burrow. If the tract was too small to exercise the onsite protection option, the landowner would have to provide 1.25 times as much protected space offsite. If the landowner could provide onsite protection but elected not to, he would have to provide twice as much protected space *offsite*. Thus, an owner of a five acre site could be required to purchase as much as 3.6 acres offsite for every 10

[3] Proposed as Rule 9J-2.0258 of the Florida Administrative Code.

[4] Proposed as Rule 39-27.013 of the Florida Administrative Code.

[5] There is a presumption that five maintained gopher tortoise burrows exist on each acre. The burden is on the owner to rebut that presumption by conducting a survey of his property.

burrows and set it aside for gopher tortoise burrows. *However*, in an obvious attempt to avoid compensating the owners, the regulation limits the percentage of the property which can be required for tortoise protection: 30% or 50% depending upon the location of the property within the State.

Even if such rules are not finally adopted, they often serve as guides for local comprehensive plans and are implemented, *de facto*. Onsite preservation and buffers can render large parcels of land virtually useless. The cost of offsite preservation can easily strip potential land use of any profit.

SUMMARY OF ARGUMENT

The decision in Lucas is erroneous and in conflict with prior opinions of the Court. The Nemours Foundation urges the Court to indicate in its decision that the discrete, affected segment of a parcel of property or property right should be the focus of a takings analysis.

ARGUMENT

A. There Was An Unconstitutional Taking Of The Lucas' Property.

The Nemours Foundation urges the court to reverse the decision of the Supreme Court of South Carolina on the ground that the South Carolina Beachfront Management Act and its implementation resulted in a taking without just compensation, in violation of the Fifth and Fourteenth amendments. That court's misreading of the opinion in

Keystone v. DeBenedictus, 480 U.S. 470 (1987), cannot be permitted to stand if the Takings Clause is to continue to have any vitality. While The Nemours Foundation disagrees with the conclusion reach by the majority in *Keystone*, it is suggested that the tortured interpretation adopted in *Lucas* below was never intended by the Court.

The majority opinion in *Lucas* adopts a simplistic or "straightforward" approach. Because Lucas did not attack the Beachfront Management Act, the court concluded that it could not engage in the careful analysis of the statute required by the previous decisions of this Court. It thus failed to distinguish between prevention of a nuisance and advancing a legitimate state interest. Nemours submits that the analysis of the dissent in *Lucas* is correct in concluding that the building of a residence does not constitute a nuisance. Further, even had such activity involved a nuisance, the *Lucas* court was required to determine whether the owner was denied economically viable use of his land. Had the court carefully considered either of these questions, it would have been compelled to affirm the condemnation award to Lucas.

B. The Takings Analysis Should Be Limited To The Property Actually Affected.

In addition to supporting Mr. Lucas' effort to obtain a reversal of the South Carolina Supreme Court decision, The Nemours Foundation entreats the court to weigh carefully the impact of its ruling on factual patterns beyond the issue as framed. Specifically, the facts in this case are confined to total economic loss of an entire parcel of land. The circumstances of The Nemours Foundation, as outlined above, illustrate the sheer impossibility in many cases of ever

demonstrating total loss of an entire parcel of land. The growing body of land use regulation in Florida has resulted in an almost imperceptible regulatory taking through inverse condemnation of much of the property upon which the Foundation's income depends. If the Court leaves the impression that lower courts may reject the notion of a taking where less, even substantially less, than the total value of an entire parcel of property (or landholdings in an area) is lost, The Nemours Foundation and its beneficiaries will be deprived of a remedy for each such taking.

The Nemours Foundation's concern is raised by comments of the Court in several recent cases, although the holdings arguably do not rest on those comments. For example, in *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130 (1978), the Court stated

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole--here, the city tax block designated as the "landmark site."

Id. at 130-131. However, this position is neither substantiated by reference to earlier decisions,[6] nor is it consistent with the Court's analysis in that case. The Court in that instance was most explicit in comparing the lost air rights (the discrete, affected segment) to the value of transferable development rights.

The majority in *Keystone* was confronted with a facial challenge to a Pennsylvania statute[7] and refused to find constitutional infirmity on the basis of the record. Nevertheless, it took great pains to explain that less than 2% of the coal reserves of the owners would be affected by the Pennsylvania law.[8] An even greater conflict with the *Penn Central* position is adopted by its author in the dissent in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In the latter case, the dissenters complain that what is "taken" amounts to a fraction of a cubic foot. Thus, discrete segments of the property at issue *are* considered by the Court, but often, seemingly, for the purpose of justifying its conclusion.

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[6] This untempered language appears for the first time in *Penn Central*, and despite its lack of support in prior cases, it is now cited and relied upon regularly by lower courts. *See McNulty v. Town of Indalantic*, 727 F. Supp. 604 (M.D. Fla 1989); *Deltona, Inc. v. U.S.* 657 F.2d 1184, 228 Ct.Cl. 476 (Ct.Cl. 1981).

[7] The Bituminous Mine Subsidence and Land Conservation Act, Pa. Stat. Ann. tit. 52, § 1406.1-1406.21 (Purdon Supp. 1991).

[8] The majority cites Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967), when comparing the coal lost by petitioners with their total reserves. However, it is doubtful that the Michelman article supports the Court's conclusion.

The Foundation is encouraged by the *Keystone* minority's acknowledgment that despite the relative size of the lost coal, it comprised 27 million tons for which the owners should have been compensated. While the minority's approach has also been followed by lower courts, there is obviously great confusion in this area. Two cases are most compelling.

In *Loveladies Harbor, Inc. v. United States*, 15 Cl. Ct. 381 (1988), the court held that the taking analysis should be applied to a 12.5 acre wetland portion of an original tract of 250 acres of which 51 acres had not been developed. The court refused to expand the definition of the affected property to either the full 250 acre parcel as originally purchased or to the remaining undeveloped 51 acres. Thus, the court ruled that the degree of impact and the type of governmental action questions were to be answered solely with respect to the wetlands portion on which development was denied.

In contrast, three years later the same court adopted a contrary position without any attempt to explain the inconsistency. *Ciampitti v. United States*, 22 Cl. Ct. 310 (1991). Relying on the above-quoted language in *Penn Central*, the court elected to focus on the "parcel as a whole." *Ciampitti*, 22 Cl. Ct. at 318. The reasoning of the court is enlightening, however, because it demonstrates the confusion between identifying the property and determining the degree of loss suffered by the owner. While it was admittedly attempting to define the affected property, the court wandered into the "bundle of rights" analysis which should only be performed after the property has been identified. *Id.*

The similarity between the facts in *Loveladies Harbor* and *Ciampitti* and the inexplicable and unexplained[9] contradiction in their analyses[10] can perhaps be rationalized by reference to the second ground for the *Ciampitti* result. The court was clearly convinced that the property owner, in the aggregate, had succeeded rather well in achieving reasonable investment expectations. It is suggested, however, that such reasoning does violence to the concept of uncompensated taking and substitutes the judiciary's opinion for that of the private investor.

The Nemours Foundation suggests that while not directly at issue here, the Court should not overlook this important aspect of a most complicated subject - the definition of the property at which the governmental action is directed. The Foundation further proposes that the Court obviate the possibility that the lower courts in future taking disputes might focus on property which is not affected but in some way related to that which has been affected. Stated otherwise, and contrary to the language from *Penn Central* quoted above, the Foundation urges the court to indicate that affected, discrete segments of a property or a property right be the focus of inquiry and that the taking rubric be applied to those specific segments.

The Nemours Foundation does not contend here that less than a total loss of value is compensable. That is an issue which must be addressed on a case by case basis and

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[9] In *Ciampitti*, the court makes no reference to *Loveladies*.

[10] The court in *Ciampitti* acknowledges that the affected parcel and another which were combined as the focus of the taking analysis were not even contiguous. *Id. at 320.*

the Florida courts have adopted a responsible approach toward that aspect of the problem. *See Joint Ventures, Inc. v. Dept. of Transportation*, 563 So.2d 622 (Fla. 1990). The Nemours Foundation suggests, however, that the analysis of the degree of loss be postponed until the affected property or property right has been isolated. At that point, a court can consider the degree of loss and the justification therefor. The regulatory framework in Florida[11] lends itself to gradual imposition of a wide variety of use restrictions which have differing impacts upon property and property rights. The constitutionality of the statutes and the regulations issued thereunder will be tested over time. It is likely that these challenges will be confined to particular takings. If the courts are permitted to apply the takings tests to entire parcels of property rather than the affected segment, large landholders, such as those from which The Nemours Foundation derives its income, will regularly lose these challenges.

An example of a small taking is found in the seventy-five foot buffer zones required in coastal, wetland, and waterfront areas. One mile of such buffer totals more than nine acres. This amounts to an almost immeasurable portion of a 200,000 acre tract, but constitutes extremely valuable property. As noted above, over 185 miles of such buffer zones could render numerous segments of property valueless over a period of years.

It is arguable that if challenges are viewed in the context of total land holdings, large landholders might never be compensated where the taking is in small increments dependent upon the whims of wildlife. As exemplified by

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[11] This would include the State as well as Federal land use and wildlife protection statutes and regulations.

proposed Rule 39-27.013 of the Florida Administrative Code, discussed *supra*, the State regulators already anticipate juxtaposing the affected segment (30% or 50% maximum) against the entire parcel, arguing that all economic viability is *not* lost. Thus, it is critical that landholder be able to challenge the taking on the basis of the segment actually affected.

CONCLUSION

While previously perhaps not a major consideration in the overall issue of governmental taking, the definition of the affected property is of paramount importance to The Nemours Foundation. Failure on the part of courts to limit their determinations to that segment of the property actually impacted by the governmental action will severely jeopardize the right to just compensation for those lands owned by those entities supporting The Nemours Foundation and its beneficiaries.

Respectfully submitted,

JOHN J. MULLENHOLZ

MULLENHOLZ & BRIMSEK
1150 Connecticut Avenue, N.W.
Suite 700
Washington, D.C. 20036
(202) 296-8000

Counsel for Amicus Curiae

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

DAVID H. LUCAS,
Petitioner,
vs.
SOUTH CAROLINA COASTAL COUNCIL,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF SOUTH CAROLINA

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AND THE INTERNATIONAL COUNCIL OF SHOPPING CENTERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

WILLIAM H. ETHIER
National Housing Center
National Association of
Home Builders
15th & M Streets, N.W.
Washington, D.C. 20005
(202) 822-0359

MICHAEL M. BERGER
Counsel of Record
of BERGER & NORTON
A Law Corporation
1620 26th Street
Suite 200 South
Santa Monica, CA 90404
(310) 449-1000

Attorneys for Amici Curiae

Lawyers Brief Service • Appellate Brief Printers • (213) 383-4457 • (714) 720-1510

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(202) 822-0359

MICHAEL M. BERGER
Counsel of Record
of BERGER & NORTON
A Law Corporation
1620 26th Street
Suite 200 South
Santa Monica, CA 90404
(310) 449-1000

Attorneys for Amici Curiae

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The National Association of Home Builders (NAHB) and the International Council of Shopping Centers, Inc. (ICSC) have received the written consent of the parties to file this brief as *Amici Curiae* in support of the Petitioner and have filed the letters of consent with the Clerk of this Court.

INTERESTS OF *AMICI CURIAE*

The NAHB represents 153,000 builder and associate members organized into approximately 850 affiliated state and local associations in all 50 states, the District of Columbia, and Puerto Rico. Its members include not only people and firms that construct and supply single-family homes, but also apartment, condominium, commercial, and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry.

The Just Compensation Clause and its implementation as a shield against oppressive governmental land use regulation is of paramount importance to the NAHB. The actual availability of compensation for the occasional statute or ordinance that results in a taking is critical to the livelihood of private landowners who either 1) have lost all reasonable economic use of their property solely in order to serve the broader public (i.e., governmental) interests, or 2) are otherwise faced with governmental requirements that fail to substantially advance legitimate governmental interests. The former type of governmental action is before the Court in this case.

The NAHB has been before this Court as an *amicus curiae* or as of counsel on behalf of the property owner in prior takings cases involving land use regulations. (*Nollan v. California Coastal Commn.*, 483 U.S. 825 [1987]; *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 [1987]; *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 [1986]; *Williamson County*

Reg. Plan. Commn. v. Hamilton Bank, 473 U.S. 172 [1985]; *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 [1981]; *Agins v. City of Tiburon*, 447 U.S. 255 [1980]) Indeed, the NAHB's brief was cited approvingly in this Court's *Nollan* opinion, 483 U.S. at 840.

The ICSC is a not-for-profit corporation that has approximately 24,000 members worldwide and approximately 22,000 in the United States. ICSC is the trade association for the shopping center industry. Its members, including developers, owners, retailers, lenders and all others having a professional interest in the shopping center industry, are engaged in the day-to-day activities of designing, planning, constructing, managing, financing, developing, leasing and owning shopping centers and their retail stores. It represents almost all of the 37,000 shopping centers in this country and is the only U.S. trade association specific to shopping centers.

ICSC's members have a clear interest in the disposition of the present case because the holding of the Supreme Court of South Carolina, if affirmed by this Court, would substantially impair the value of many members' property by eliminating reasonable expectations of development rights.

These *amici*'s joint interest lies in seeing that the law in this field remains consistent, fair, and cognizant of the need to protect the rights of the individual when confronted with well-meaning government officials whose actions to achieve a public good may impinge on Constitutional guarantees. As Justice Brandeis insightfully admonished:

> "Experience should teach us to be most on our guard to protect liberty when government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." (*Olmstead v. U.S.*, 277 U.S. 438, 479 [1928] [Brandeis, J., dissenting])

SUMMARY OF ARGUMENT

Ends and means. As is so often the case in constitutional litigation, that is what this case is about.

The South Carolina Coastal Council and the South Carolina Supreme Court focus on the ends sought to be achieved by prohibiting home construction near the coast. They argue as though recognition of that "good" is the end of the inquiry.

However, this Court's consistent jurisprudence makes clear that recognition of a proper governmental goal is only the beginning of the inquiry; it is not the end. (E.g., *Kaiser Aetna v. U.S.*, 444 U.S. 164, 174 [1979]; *Loretto v. Teleprompter Manhattan CATV Corp.*, 485 U.S. 419, 425 [1982].) For, if the governmental action is not in pursuit of a legitimate goal, then the action would be *ultra vires* and invalid without more. Once a valid goal is recognized, the means chosen to obtain that goal must be subjected to constitutional scrutiny to determine whether the rights of those injured in the process have been adequately protected:

> "[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and of the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more than mediocre ones." (*Stanley v. Illinois*, 405 U.S. 645, 656 [1972]; footnote omitted.)[1]

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[1] See also *Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *McNabb v. U.S.*, 318 U.S. 332, 347 (1943); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

South Carolina has cast its net too broadly. In its overriding concern to find a solution to a perceived problem, South Carolina forgot the rights of those whose property was to be sacrified for the perceived greater good. The Fifth Amendment's Just Compensation Clause was designed to afford protection in cases of such governmental oversight.

ARGUMENT

I. BACKGROUND: THE NEED FOR FAIRNESS IN LAND USE REGULATION

As the unified voice of the home building industry in America, the NAHB cannot let pass the central idea in the legislation before this Court, i.e., that there is something so nefarious about the building of a home that home construction can be condemned as a nuisance. At bottom, all that Mr. Lucas wanted to do was to build two homes on land which was of a type which had historically been so used. In an economic era when people find themselves compelled to seek large packing crates for shelter, there seems something oddly surreal in condemning the construction of homes as a nuisance which is so heinous that it can be prevented without any thought of compensating the landowner.

Home building is not evil. There are ways to build homes to ensure that they do not create problems for their neighbors. South Carolina, however, chose not to avail itself of the benefits of modern technology. Instead of a scalpel, it reached for an axe. It perceived a problem on its coast and sought to solve that problem by the simple expedient of precluding the construction of any homes.

That simplistic solution finds numerous counterparts in current land use regulations. Indeed, the problem — and its chief consequence, a rising lack of affordable housing — has become pervasive enough to result in yet another federal

government study, in the form of a report to President Bush and Housing Secretary Kemp. (Advisory Commn. on Regulatory Barriers to Affordable Housing, *"Not In My Back Yard": Removing Barriers to Affordable Housing* [1991] [hereafter cited as *NIMBY Report*])[2] Thus, before proceeding further, it seems appropriate to describe the regulatory climate in which it is possible for such draconian legislation to be enacted.

Developing land these days is not for the faint of heart. Nor is it any place for those short of stamina or economic staying power. The multi-tiered regulatory system facing property owners can be as daunting as it is bewildering, with [sometimes well-intentioned] regulatory bodies and their discrete regulations proliferating.[3] From every governmental office, bureau, department, board or commission, bureaucrats

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2 A report of the situation a decade ago, which had reached the same conclusions about the adverse effect of land use regulations on the affordability of housing, can be found in *Report of the President's Commission on Housing* 177-183 (J. Foote ed. 1982). The human cost of excessive regulation, in the sense of driving people out of the housing market, is hardly a secret aside from the governmental commissions. For a sampling of similar conclusions from varying sources, see, e.g., Delogu, *The Misuse of Land Use Control Powers Must End: Suggestions for Legislative and Judicial Responses*, 32 Me. L. Rev. 29, 61 (1980); Lefcoe, *California's Land Planning Requirements: The Case for Deregulation*, 54 S. Cal. L. Rev. 447, 462 (1981); Pulliam, *Brandeis Brief for Decontrol of Land Use: A Plea for Constitutional Reform*, 13 Sw. U.L. Rev. 435 (1983).

3 See, e.g., *Nimby Report* 8:

> "Numerous Federal, State, and local regulations that are intended to achieve specific, admirable goals turn out to have negative consequences for affordable housing. The impact on housing costs may not have been considered when the regulations were promulgated."

Although noted here in a 1991 report, this regulatory Balkanization has long roots. See Delogu, *Local Land Use Controls: An Idea Whose Time Has Passed*, 36 Me. L. Rev. 261 (1984); Krasnowiecki, *Abolish Zoning*, 31 Syracuse L. Rev. 719 (1980); Hagman & Misczynski, *The Quiet Federalization of Land Use Controls: Disquietude in the Land Markets*, 40 The Real Estate Appraiser 5, 7 (1974); Mandelker, *Managing Our Urban Environment* 19 (1966).

(often responding to no more than selfish demands of established neighborhood groups or single issue environmentalist constituencies)[4] issue a series of decrees that can, and often do, transform a desirable and well thought out plan of land development into an economically infeasible fiasco. On rare occasion, a court will come to the property owner's aid on particularly outrageous facts, but not with such reliability as to diminish the size of the risk of such enterprises. As the most recent study concluded:

> "Millions of Americans are being priced out of buying or renting the kind of housing they otherwise could afford were it not for a web of governmental regulations. For them, America — the land of opportunity — has become the land of a frustrating and often unrewarded search for an affordable home."[5]

Much of the unconcerned attitude on the part of the regulators was spawned during the 1980s, before this Court decided *First English*, and resolved the question (or so one would have thought) of the constitutional consequences of over-regulation.[6] Slowing the momentum and changing the

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4 *Nimby Report* 8; Babcock, *The Zoning Game* 141 (1966); Frieden, *The Environmental Protection Hustle* 8 (1979); Tucker, *Progress and Privilege: America in the Age of Environmentalism* (1982); Branch, *The Sins of City Planners*, 42 Pub. Ad. Rev. 1, 3 (1982).

5 *NIMBY Report* 3. Quantifying that generality, the report concludes that excessive regulation can add $15,000 to $30,000, or 25-30% to the cost of modest housing. (*NIMBY Report* 5)

6 Professor Richard Babcock, the dean of the American land use bar, has called overreaching governmental regulation (in which the regulators demand that which they know they are legally precluded from demanding but which they know their targets cannot afford the time or expense to challenge) "municipal leverage." (Babcock, *Foreword to Exactions: A Controversial New Source For Municipal Funds*, 50 Law & Contemp. Probs. 1, 2 [1987]) Aside from this Court's celebrated response in *Nollan v. California Coastal Commn.*, 483 U.S. 825, 837 (1987), in which this Court described such tactics as "extortion," some condemnatory judicial reactions can be found in *Collis v. City of Bloomington*, 246 N.W.2d 19, 26

(continued)

approach of those regulators has not been easy. The steady stream of petitions presented to this Court attests to that.

Coupled with the apparent judicial indecision over remedies has been the agony of determining whether a land use dispute is "ripe" enough to obtain the attention of the courts. While a complete discussion is plainly beyond the scope of this brief, suffice it to note that almost all regulatory taking complaints are met with a governmental defense that the case is not yet ripe, and a staggering number of those cases are resolved in the government's favor. (Mandelker & Blaesser, *Applying the Ripeness Doctrine in Federal Land Use Litigation*, 11 Zoning & Planning Law Report [July-Aug. 1988] 49, 53; emphasis added.) As one government lawyer expressed it, "[l]ike the vagueness of the three-factor analysis [for determining what is a taking], this [ripeness] requirement has historically worked to the advantage of government regulators." (Lawrence, *Regulatory Takings: Beyond the Balancing Test* [1988] 20 The Urban Lawyer 389, 400 fn. 71)

In apparent recognition of the difficulties facing property owners, this Court has repeatedly held that a property owner's reasonable, or distinct, investment-backed expectations merit Fifth Amendment protection against harsh regulatory interference.[7] In three of those decisions which

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(fn. continued)
(Minn. 1976) ["grand theft"]; *West Park Ave., Inc. v. Township of Ocean*, 224 A.2d 1, 4-5 (N.J. 1966) ["municipal lawlessness"]; *J.E.D. Associates, Inc. v. Town of Atkinson*, 432 A.2d 12, 14 (N.H. 1981) ["extortion"].

7 *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978); *Andrus v. Allard*, 444 U.S. 51 (1979); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Hodel v. Virginia Surface Min. & Recl. Assn.*, 452 U.S. 264 (1981); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1 (1984); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984); *United States v. Locke*, 471 U.S. 84 (1985); *Williamson County Reg. Plan. Commn. v. Hamilton Bank*, 473 U.S. 172 (1985); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985); *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986);

(continued)

involved land use regulations, this Court measured the regulations against the property owner's ability to earn a profit or make a reasonable return on investment.[8]

That protection of reasonable expectations against undue regulatory interdiction supplies fairness to the process and provides incentives to property owners to become involved in the development process. Actions like South Carolina's, by contrast, which purport to extinguish reasonable expectations without compensation, are as counterproductive in the housing market as they are unconstitutional.

This Court was right to recognize the expectations interest as one which merits constitutional protection. By actually providing protection in the case at bench, this Court can demonstrate its adherance to the concept and let lower courts and regulatory entities know the seriousness of the protection to be accorded.

II. GOOD INTENTIONS ARE NO DEFENSE TO A FIFTH AMENDMENT VIOLATION

The explicit premise of the South Carolina legislation is that, if the end sought to be achieved by government regulation can be said to be virtuous, then there cannot be a Fifth Amendment violation.

That concept is foreign to this Court's jurisprudence. At its most basic, this Court has held that a taking occurs if a land use regulation *either* fails to substantially advance a legitimate state interest *or* denies the property owner economically viable use of his land. (E.g., *Agins v. City of*

(fn. continued)
Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); *Nollan v. California Coastal Commn.*, 483 U.S. 825 (1987).

8 *Penn Central*, 438 U.S. at 136; *Williamson County*, 473 U.S. at 200; *Keystone*, 480 U.S. at 496, 501.

Tiburon, 447 U.S. 255 [1980]) Perforce, that means that a regulation effects a taking even if done for a legitimate purpose if its effect is to deny economically viable use to the owner.

When there is a taking, there must be compensation. A taking for public use without compensation violates the Fifth Amendment:

> ". . . government action that works a taking of property rights *necessarily* implicates the 'constitutional obligation to pay just compensation.' [Citation.]" (*First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 [1987]; emphasis added.)

If government enacts legislation which takes property and intends to provide no compensation, the legislation is invalid. (*Hodel v. Irving*, 481 U.S. 704 [1987])

Governmental power is not permitted to run roughshod over the constitutionally protected rights of individuals. That is what this Court was talking about when it concluded in *First English* that ". . . many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities and the Just Compensation Clause of the Fifth Amendment is one of them." (482 U.S. at 321)

In so holding, *First English* continued a long line of this Court's decisions that the Fifth Amendment places a stern restriction on the exercise of all governmental power.

For example, in *Loretto v. Teleprompter Manhattan CATV Corp.*, 485 U.S. 419 (1982), the Court was faced with a statute designed to facilitate communication via cable television. The State of New York required landlords to permit the installation of cables on their property. The City of New York urged, and the state courts agreed, that the objective was a legitimate police power activity in the nature of regulation, and thus beyond constitutional challenge. This Court

reversed, concluding that recognition of a valid police power objective was only half the case. The other half of the case dealt with the means chosen to attain it:

> "The Court of Appeals determined that §828 serves the legitimate public purpose of 'rapid development of and maximum penetration by a means of communication which has important educational and community aspects,' and thus is within the State's police power. We have no reason to question that determination. *It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid.*" (458 U.S. at 425; emphasis added.)

The same conclusion appears in *Kaiser Aetna v. U.S.*, 444 US 164 (1979). There, the Army Corps of Engineers decreed that a private marina must be open to the public. The reason for this Court's disagreement is telling:

> "In light of its expansive authority under the Commerce Clause, there is *no question* but that congress could assure the public a free right of access to the Hawaii Kai Marina if it so chose. Whether a statute or regulation that went so far amounted to a 'taking,' however, is *an entirely separate question.*" (444 U.S. at 174; emphasis added.)

See also *U.S. v. Security Industrial Bank*, 459 U.S. 70 (1982) [retroactive application of bankruptcy legislation is subject to the Fifth Amendment].[9]

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9 Among the early antecedents of this rule is *Delaware, L. & W.R. Co. v. Morristown*, 276 U.S. 192, 193 (1928):

> "But, assuming that under the circumstances the creation of the public hack stand would be a proper exertion of the police power, *it does not follow* that the due process clause of the 14th Amendment would not safeguard to the owner just compensation for the use of its property." (Emphasis added.)

In a similar vein, of course, are cases such as *Preseault v. ICC*, 494 U.S. 1 (1990), *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), *Dames & Moore v. Regan*, 453 U.S. 654 (1981), and the *Regional Rail Reorganization Act Cases*, 419 U.S. 102 (1974). In each of them, this Court was faced with the claim that Congress, in pursuit of legitimate goals,[10] had taken private property in violation of the Fifth Amendment. In each, this Court directed the property owners to the U.S. Claims Court to determine whether these legitimate exercises of legislative power required compensation. Noble regulatory goals cannot override constitutional guarantees:

> "Mass transportation, energy conservation, and environmental protection are goals that are important and of legitimate public concern. Appellees contend that these goals are so important that any harm to bondholders from repeal of the 1962 covenant is greatly outweighed by the public benefit. We do not accept this invitation to engage in a utilitarian comparison of public benefit and private loss. . . . Thus, a State cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors." (*United States Trust Co. v. New Jersey*, 431 U.S. 1, 29-30 [1977])

This consistent teaching probably explains why the Court of Appeals for the Federal Circuit, a body which hears all appeals from the Claims Court (the court which adjudicates more takings cases than any other because it is virtually the exclusive forum for takings cases against the United States), has had no trouble recognizing that the Just Compensation Clause operates against *proper* governmental action:

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10 Respectively, the preservation of rail transportation corridors, the registration of pesticides, the aftermath of the Iranian hostage crisis, and the provision of rail service to the Northeast United States.

> "In such cases the characteristic feature is the defendant's use of *rightful* . . . regulatory rights to control and prevent exercise of [private] ownership rights the defendant is unwilling to purchase and pay for."[11]

In *Berman v. Parker*, 348 U.S. 26 (1954) the government's right to condemn land for an urban renewal project was challenged. This Court had no question that the program was a rational governmental project and within the power of the legislative branch to decide to accomplish. Nonetheless, the transfer of property interests could not be done without just compensation. Likewise, *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) involved Hawaii's right to use the eminent domain power to break up an oligopolistic form of land ownership by taking property from large landowners and transferring fee title to individuals. This Court did not question that the land redistribution was a rational governmental project. Nonetheless, the transfer of property interests could not be accomplished without just compensation.

The upshot of the governmental position at bench would be the elimination of the Just Compensation Clause. In its repeated analysis of the issue, this Court has consistently defined a regulatory taking in terms of three factors — diminution of the property's economic value, interference with distinct investment-backed expectations, and the character of the government's action (the latter primarily concerned with whether there has been a physical invasion of property rights). (E.g., *Penn Central Transp. Co. v. City of New York*,

11 *Florida Rock Indus., Inc. v. U.S.*, 791 F.2d 893, 899 (Fed. Cir. 1986). (Quoting with approval; emphasis, the Court's.) See also *Whitney Benefits, Inc. v. U.S.*, 926 F.2d 1169, 1177 (Fed. Cir. 1991); *Skaw v. U.S.*, 740 F.2d 932, 939 (Fed. Cir. 1984). For a sampling of other courts reaching the same conclusion, see *Richmond Elks Hall Assn. v. Richmond Redevelopment Agency*, 561 F.2d 1327, 1332 (9th Cir. 1977); *Mattoon v. City of Norman*, 617 P.2d 1347, 1349 (Okla. 1980); *Knight v. City of Billings*, 642 P.2d 141, 145-46 (Mont. 1982); *San Antonio River Auth. v. Garrett Bros.*, 528 S.W.2d 266, 273 (Tex. Civ. App. 1975).

438 U.S. 104, 124 [1978].) All three of these factors relate only to the impact of the government's regulation on the individual's property interest. They have nothing to do with the legitimacy of the governmental goal. When inquiring whether a governmental regulation violates the Just Compensation Clause of the Fifth Amendment, the question is not the subject matter of the governmental regulation, but the impact on the private property owner. (E.g., *Kaiser Aetna*, 444 U.S. at 174.) Indeed, as this Court said long ago in *Boston Chamber of Commerce v. Boston*, 217 U.S. 189, 195 (1910), ". . . the question is, What has the owner lost?, not What has the taker gained?"[12]

Thus, regardless of South Carolina's good intentions in enacting this scheme, the Fifth Amendment prohibits the State from achieving its goals by the uncompensated seizure of private property development rights.

III. DEFINITIONAL *IPSE DIXIT* CANNOT CONTROL CONSTUTIONAL ADJUDICATION

The South Carolina Supreme Court relied on the idea that there is a "nuisance exception" to the constitutional command for compensation. No doubt the governmental briefs in this Court will do so as well.

Mr. Lucas' brief on the merits discusses the validity of the "nuisance exception" at length, and that argument will not be rehearsed here. However, in light of the clear authorities discussed above which preclude the defense of "good intentions," two things must be said about that "exception." First,

12 With due respect to good intentions, a substantial factor in the lack of affordable housing today has been "environmental" regulations:

> "Exerting considerable influence on both urban and suburban landscapes, otherwise valuable environmenal protection regulations seriously restrict the amount of buildable land that is available for development. This effect raises the cost of what land remains open for homebuilding." (*NIMBY Report* 6)

to the extent it has validity at all, it is a narrow exception to the general responsibility to compensate for property taken. Second, the agency drafting the regulatory restriction cannot be permitted to define its liability out of existence by the simple expedient of declaring something to be a nuisance.

A. The General Rule Requires Compensation; Any Exception Must be Truly Narrow

The "nuisance exception" is said to stem from this Court's decision in *Mugler v. Kansas*, 123 U.S. 623 (1887). Thus, the place to begin any inquiry into the meaning of that "exception" is in *Mugler*. There, this Court explained the limited nature of its holding:

> "The power which the States have of prohibiting such *use* by individuals of their property *as will be prejudicial* to the health, the morals, or the safety of the public, is not — and, consistent with the existence and safety of organized society, cannot be — burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted *by a noxious use of their property, to inflict injury upon the community.*" (123 U.S. at 669; emphasis added.)

Thus, what this Court permitted in *Mugler* was the uncompensated prohibition of *a specific use* of property which *caused injury* to others. As the Court noted, "[s]uch legislation does not disturb the owner in the control or use of its property for lawful purposes . . . ." (123 U.S. at 669) That conclusion was reinforced in this Court's more recent discussion in *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 488 (1987) which described *Mugler* and its progeny as applying to "... *activities* akin to a public nuisance." (Emphasis added.)

Neither in *Mugler*, nor any of its progeny, was there a *total* prohibition of use. A specific use was involved in each case. Although the regulations may have precluded the property owner's preferred use (even the property's most valuable use), it did not preclude all economically viable use.

Curtin v. Benson, 222 U.S. 78 (1911), another case decided in that same era, makes it clear that *Mugler* was not intended to grant *carte blanche* to government agencies to regulate private property into oblivion. As this Court put it in *Curtin*:

> "On the merits of the case we may concede, *arguendo*, as contended by the [governmental] appellees and disputed by appellant [property owner], that the United States may exercise over the park not only rights of a proprietor, but the powers of a sovereign. There are limitations, however, upon both. *Neither can be exercised to destroy essential uses of private property.* The right of appellant to pasture his cattle upon his land, and the right of access to it, are of the very essence of his proprietorship. May conditions be put upon their exercise such as appellees put upon them? . . . [The government's] *order is not . . a regulation of the use of the land, as an order to fence the lands might be, but is an absolute prohibition of use. It is not a prevention of a misuse or illegal use, but the prevention of a legal and essential use*, — an attribute of its ownership, — one which goes to make up its essence and value. To take it away is practically to take his property away, and to do that is beyond the power even of sovereignty, except by proper proceedings to that end." (222 U.S. at 86; emphasis added.)

This recognition that total use preclusion without compensation is forbidden by the Fifth Amendment was recently confirmed in *First English*, 482 U.S. at 316-317, with this

Court taking as its text the following comment from another *Mugler* contemporary, *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 177-178 (1872):

> "It would be a very curious and unsatisfactory result, if . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not *taken* for the public use." (Emphasis, the Court's.)

Thus, to the extent it makes any sense to recognize an "exception" from the Constitutional command of compensation, this Court's cases have treated the "exception" as a narrow one. The holding sought by South Carolina would have the "exception" swallow — in fact, displace — the rule.

B. The Regulator Cannot be Permitted to Immunize Itself by Defining its Target as a Nuisance

An insidious aspect of the "nuisance exception" idea is that the governmental proponents of it generally arrogate to themselves the power to decide *whether* something is a nuisance. Here, for example, the South Carolina legislature purported to make "findings" that home construction is a nuisance and therefore could be prevented by fiat.

The potential for result-driven "findings" and subjective (even if unconscious) value judgements is unmeasurable. In a constitutional system, such as ours, the legislative branch cannot be given (or abdicated) the power to determine its own Fifth Amendment liability by the simple expedient of defining the target of its actions as a nuisance. Judicial

interposition, to determine the actuality of the "nuisance," is essential for the proper functioning of the Fifth Amendment's scheme. As the Claims Court has recently remarked, to accept the assertion that a particular activity *is* a nuisance merely because Congress chose to prohibit it is "circular reasoning" (*Florida Rock Indus., Inc. v. U.S.*, 21 Cl. Ct. 161, 168 [Cl. Ct. 1990]) which has "no benchmark of objectivity" (*Loveladies Harbor, Inc. v. U.S.*, 15 Cl. Ct. 381, 389-90 [Cl. Ct. 1988]) and which "would yield the destruction of the fifth amendment." (*Florida Rock*, 21 Cl. Ct. at 168)

In other contexts, this Court has refused to permit wordplay as a substitute for compliance with the Just Compensation Clause:

> "This Court has stated that a sovereign 'by ipse dixit, may not transform private property into public property without compensation . . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent.' " (*Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1012 [1984]; quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 [1980].)

Moreover, such deferential abdication to the legislative branch is contrary to this Court's general approach to takings cases. In *Agins v. City of Tiburon*, 447 U.S. 255, 260-261 (1980), for example, the Court explained that the "determination that governmental action constitutes a taking, is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest," and recognized that this question "necessarily requires a weighing of private and public interests." That essential "weighing" process in the Constitutional matrix cannot be accomplished by conclusively granting the governmental side the power to dictate the ground rules by defining targets of regulation as nuisances.

Examining this Court's precedents, the 9th Circuit Court of Appeals recently concluded that the balancing test required to determine whether there has been a taking mandates careful factual examination. That analysis seems equally apt in the context of permitting one litigant to define the terms of the dispute in such a way that its conduct is immunized, as several of the illustrative cases are "nuisance" taking cases. As the 9th Circuit explained:

> "To hold that a legitimate public interest alone precludes a taking without regard to the degree of private deprivation turns the Court's balancing of interests into a bright-line test for which there is no precedent. The Court's own disclaimers make this clear. *See, e.g., United States v. Riverside Bayview Homes*, 474 U.S. 121, 126 (1985) ('We have never precisely defined those circumstances' when governmental land-use regulations amount to a taking); *Penn Central Transp. Co.*, 438 U.S. at 124 (takings analysis involves 'essentially ad hoc, factual inquiries'); *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962) ('no set formula to determine where regulation ends and taking begins'); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (takings determination is 'a question of degree — and therefore cannot be disposed of by general propositions')." (*McDougal v. County of Imperial*, 942 F.2d 668, 677 (9th Cir. 1991); parallel citations omitted.)

That excessive deference is not due the government's definitional efforts is borne out by *First English* and *Nollan*, in which this Court declared that the rights of property owners are to be protected by the judiciary against the "cleverness and imagination" of governmental word games (*Nollan* 483 U.S. at 841), even if that "lessen[s] to some extent the freedom and flexibility of land use planners and governing bodies of municipal corporations . . . ." (*First*

English, 482 U.S. at 321) The thought was further emphasized in *Nollan* when this Court concluded that the standard which the government must meet to successfully defend its actions is a stricter one than the "rational basis" test historically applied in due process cases. (483 U.S. at 834, fn 3)

Allowing government to define the terms in such a way that there is only one possible outcome to litigation does not comport with this Court's takings jurisprudence. It's not good sense either. It would provide government with a license to confiscate by definitional *ipse dixit*. What governmental entity could resist such a tempting way to balance its budget? A self-declared and self-fulfilling power to define constitutional liability and immunity is foreign to the Fifth Amendment. To adopt South Carolina's position would truly eliminate the Fifth Amendment's protection of property owners.

CONCLUSION

Good intentions are not enough. Neither is significant public benefit. In fact, the presence of both good intentions and substantial public benefit merely leads to the conclusion that the government is acting in an area appropriate for governmental conduct. Neither addresses the compensation question.

In *First English*, this Court may have believed that it had answered the question. There, with simple elegance, this Court held that the Fifth Amendment's Just Compensation Clause means precisely what it says: when there is a taking — regardless of the instrumentality of the taking — the Constitution demands compensation. Period.

South Carolina, like many of those who can be expected to appear as its *amici*, has not learned that lesson. It believes that it can, with constitutional impunity, enact stultifying regulations which have popularity with significant blocs of the voting public and harm only the interests of a

disorganized few. It cannot. The purpose of the Fifth Amendment was to stand as a shield against governmental overreaching even against unpopular targets.

One cannot improve on the straightforwardness of *First English*:

> ". . . government action that works a taking of property rights necessarily implicates the constitutional obligation to pay just compensation." (482 U.S. at 315; internal quotation marks and citation omitted.)

At bottom, that is all this case is about. As this Court reaffirmed that simple rule in *Preseault v. ICC*, 494 U.S. 1 (1990), so the facts at bench call for the same application.

These *amici* pray that the decision of the South Carolina Supreme Court be reversed.

DATED: December 31, 1991.

Respectfully submitted,

MICHAEL M. BERGER
Counsel of Record

of BERGER & NORTON
A Law Corporation

WILLIAM H. ETHIER
National Housing Center
National Association of
Home Builders

Attorneys for Amici Curiae

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No. 91-453

IN THE

Supreme Court of the United States

October Term, 1991

DAVID H. LUCAS,

Petitioner,

against

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

Brief *Amicus Curiae* of Fire Island Association in Support of Petitioner

BERNARD S. MEYER*
1505 Kellum Place
Mineola, NY 11501
(516) 741-6565

ERIC LANE
1505 Kellum Place
Mineola, NY 11501
(516) 741-6565

Attorneys for Amicus

*Counsel of Record

THE REPORTER COMPANY, INC.—Walton, NY 13856—800-252-7181
Syracuse Office, University Building, Syracuse, NY 13202—315-426-1235
NYC Office—30 Vesey St., New York, NY 10007—212-732-6978—800-800-4264
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No. 91 -

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991.

DAVID H. LUCAS,

Petitioner,

against

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

Brief *Amicus Curiae* of Fire Island Association in Support of Petitioner

Interest of *Amicus Curiae*[1] and Summary of the Argument

The Fire Island Association, Inc. (FIA), a not for profit corporation, is a league of seventeen property owner associations that collectively represent approximately 3,800 owners

[1]Letters from both parties consenting to the filing of this brief are being filed with the Clerk of the Court together with the brief.

of private property within the boundaries of the Fire Island National Seashore. The presidents of the community associations comprise the board of directors of FIA, but there is no formal relationship between FIA and the community associations. In addition to its member associations, there are 1,235 paid individual members of FIA for the 1991-92 fiscal year. These individual members are owners of residences or of vacant land located on the Fire Island barrier island and mainly situated there in primary or secondary dunes. Most of the members' residences or vacant land were respectively built or subdivided into lots conforming to municipal zoning codes before July 27, 1981, the effective date of New York's Environmental Conservation Law (McKinney's Consolidated Laws, Book 17 1/2, Article 34). As authorized by that Article, the New York State Department of Environmental Conservation has promulgated Coastal Erosion Management Regulations (6 NYCRR, Part 505), which proscribe all development of the primary dune and nearshore area (Regs. 505.8[a][2] and [d][5]) without a coastal erosion management permit, and the restoration of any existing structure damaged or destroyed by coastal flooding and erosion, the cost of which equals or exceeds 50 percent of the estimated full replacement cost of the structure at the time of restoration, without such a permit (Reg. 505-2[jj], 505.8[b][4]; 505.8[d][7]).

The decision of The South Carolina Supreme Court held that State's Beachfront Management Act constitutional notwithstanding its prohibition against development of Lucas' property. It did so on the basis of public nuisance caselaw, without analysis of the South Carolina Act in relation to that law, and notwithstanding that under that Act the only structure that could be erected on Lucas' lots was a small deck or walkway and the only use to which they could be put was recreational. If that decision is affirmed by this Court, the rights of Fire Island Association members in relation to the grant of a permit under Article 34 of New York's Environmental Conservation Law will be materially and adversely affected.[2]

In what follows, therefore, *amicus* argues in support of petitioner that the South Carolina court reached its nuisance conclusion without analysis of the Act and thus improperly applied this Court's caselaw which held noncompensable a statute the direct effect and purpose of which was to proscribe conduct constituting a public nuisance.

Amicus argues further that the Beachfront Management Act is not a zoning ordinance to which rational basis scrutiny applies, but rather in prohibiting all use other than recreational is an enactment to which intermediate scrutiny should be applied, and when so reviewed should be held to constitute a taking requiring the payment of compensation.

ARGUMENT

POINT I

The Beachfront Management Act is not a public nuisance enactment.

The South Carolina Supreme Court held that "when a State merely regulates use, and acts to prevent a serious public *harm*, there is no 'taking' for which compensation is due," 404 S.E.2d 895, 900 (emphasis in original). It supported that holding by referring to prior decisions of this Court, as follows (404 S.E.2d at 898):

---

[2]The importance of the issues not only to the members of *amicus* but also to many other property owners in coastal areas is indicated by the Hearings Before The Subcommittee on Policy Research & Insurance of the Committee on Banking, Finance and Urban Affairs of the House of Representatives (July 13, 1990, Serial No. 101-150), which at pages 188-215 details beachfront management programs in eighteen states and territories in addition to South Carolina and New York.

"See, e.g., *Mugler v. Kansas*, 123 U.S. 623, 8 S.Ct. 273, 31 L.Ed. 205 (1887) (prohibition on the manufacture and sale of intoxicating liquors); *Hadacheck v. Sebastian*, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348 (1915) (ordinance prohibiting the manufacture of bricks near residents in Los Angeles); *Miller v. Schoene*, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568 (1928) (state action destroying diseased cedar trees of certain property owners to prevent the infection of apple orchards); and *Goldblatt v. Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962) (prohibition against excavating below the water table in order to extract gravel).

But in each of those cases the enactment which had been passed under the police power had a direct and substantial relation to the public's health, safety or welfare, and/or upon the private interests of other property owners affected by the nuisance-like condition. Thus, in *Hadacheck* the court noted (239 U.S. at 408) the allegation by the defense that fumes, gases, smoke, soot, steam and dust from the brick manufacturing plant had caused sickness and serious discomfort to those living in the vicinity; in *Miller* it contrasted the public concern in the preservation of the apple growers' interests with the lesser interest of the owners of the diseased cedar trees who would still be permitted to use or sell the wood of those trees; in *Goldblatt* the property owner had failed to show that there was no, or only a *de minimus*, effect on public safety (369 U.S. at 595) and in *Mugler* the direct relation of prohibiting manufacture of intoxicants on public health, safety and welfare was clear.

In the *Lucas* case there is no such direct relationship to the health, safety or welfare of the public or of the owners of other property on the Isle of Palms. True, Section 1, paragraph a of the Beachfront Management Act lists as one of the functions served by the Act that it protects life and property by serving

as a storm barrier, but that is a generalization[3], unlike the direct nexus between disease which infected the red cedars in *Miller* and the apple orchards that would be destroyed by that disease if the infected red cedars were not first destroyed. Moreover, the remaining functions listed in Section 1, paragraph a (provides a basis for tourism, provides a habitat for plants and animals, provides a natural health environment for citizens of South Carolina to spend leisure time) all involve *enhancement* of the rights of *others* rather than the *protection* of health, safety and welfare against the direct effects of the activity enjoined. Thus, as noted in Justice Harwell's dissent—"the Beachfront Management Act does not have as its *primary* purpose the prevention of a nuisance and is therefore not subject to the *Mugler* analysis" (404 S.E.2d at p. 906; emphasis in original).

Finally to be noted on this point is that while the court below held that Lucas' failure to attack the legislature's "findings" that new construction would cause serious public harm amounted to a concession that the *Mugler* "nuisance-like exception" applied (404 S.E.2d at 900), it never itself articulated why erection of houses on the Lucas lots could properly be considered a nuisance by reason of location alone, or how location related to erosion in order to constitute such buildings a public nuisance. Thus, it appears open to serious question that the South Carolina legislature deemed beachfront development a public nuisance.

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[3]It is, moreover, a generalization called into serious question by Chapter 6 of the Hearings referred to in footnote 2 above which states that the problem of beach changes "is indeed inherently chaotic" (p. 524; see also p. 526 ("lack of functional relationships"), that "a set relationship at one place may not be valid elsewhere"(p. 529) and that "to improve the methodology for assessing beach erosion and the risk of collapse of structures, much more research needs to be undertaken" (p. 531).

POINT II

The Beachfront Management Act should be subjected to intermediate scrutiny and when so reviewed constitutes a taking requiring payment of compensation.

For the South Carolina Supreme Court it was enough "that Lucas does not challenge the fact that the legislation here is necessary to prevent serious injury to the community" (404 S.E.2d at p. 901), see also its reference to "Lucas' *de facto* concession of the validity of the legislative scheme and its purposes" (404 S.E.2d at 902). In so doing it was in effect applying rational basis scrutiny rather than intermediate scrutiny, which would have required it to consider not only whether the statutory scheme served important governmental objectives, but also whether it was substantially related to achievement of those objectives, *Fullilove v. Klutznick*, 448 U.S. 448, 519; *Craig v. Boren*, 429 U.S. 190, 197.

Yet as Professor Richard Epstein notes in Takings—Private Property and the Power of Eminent Domain (1985), p. 128:

> "The question of overbreadth and underbreadth so critical to the constitutional inquiry necessarily imitates the task of balancing hardships that has long been the byword of responsible courts of equity. To look only at the risks the state prevents is to ignore those it has increased. As matters of estimate replace matters of principle, some judicial deference is required. The number of factors that bear on the question of just compensation is large, and they are not uniquely ordered. Any complete inquiry must look not only at the statute itself, but at the uneasy mix of legislative competence and legislative bias, all in an effort to assess whether the remedy chosen fits the evil to be avoided. The task invites difficult marginal cases, for

> minimizing error does not eliminate it when the subject matter is so diffuse and amorphous. Nonetheless, even after allowances are made for the inherent difficulty of the inquiry, the Supreme Court, here as elsewhere, has set its thumb too heavily on the side of state power. In this area too the rational basis test precludes any serious review of the fit between means and ends. What is needed is an intermediate standard of review that says, as did the court in *Lochner*, "The mere assertion that the subject relates though but in a remote degree to the public health does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate.[4]

Epstein argues, therefore, that "intermediate scrutiny is still clearly appropriate in the eminent domain area" (*id*, p.137).[5]

We urge this Court in reversing the South Carolina Supreme Court's decision to make clear that on remand the level of scrutiny should be intermediate rather than rational basis. If intermediate scrutiny is applied, the existence of serious harm alone is not enough, for as Justice Harwell, dissenting below, noted this Court's decision in *Keystone Bituminou Coal Association v. Debenedictis*, 480 U.S. 470, "does not hold that every exercise of the police power can escape the Constitution by calling that which it seeks to prevent a nuisance. Such an interpretation would totally eviscerate the takings clause" (404 S.E.2d at 905). Here, as argued in Point I above, the relation between means and the end sought to be achieved is at best tenuous, as the Court below should have found had it gone beyond its "finding" of serious public harm.

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[4]*Lochner v. New York*, 198 U.S. 45, 57.

[5]See also in this connection footnote 3 to the majority opinion in *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 and the text of the opinion to which it relates.

To determine whether there has been a regulatory taking of the Lucas property required the court below not only to consider the means-ends relationship, but also "to compare the value that has been taken from the property with the value that remains in the property", *Keystone, supra,* 480 U.S. at 497. Although such a comparison is "by no means conclusive", *Goldblatt v. Town of Hempstead,* 369 U.S. 590, 594, "if regulation goes too far it will be recognized as a taking", *Pennsylvania Coal v. Mahon,* 260 U.S. 393, 415. In *Andrus v. Allard,* 444 U.S. 51, such a comparison resulted in a holding that there had been no compensable taking by reason of regulations prohibiting the purchase or sale of pre-existing avian artifacts where the owners retained "the right to possess and transport their property, and to donate or devise the protected birds" (444 U.S. at 66) and to "exhibit the artifacts for an admissions charge" (*id*). The situation here is, however, completely different. As found by the trial Judge Lucas' "reasonable investment backed expectations" (*Keystone, supra,* 480 U.S. at 495), when on December 3, 1986 he purchased the two lots in question for $975, 000 were that he could build a single family residence on each lot and there were, at that time, no restrictions that would have prevented his doing so. As the South Carolina Supreme Court recognized, however, "the [Beachfront Management] Act prohibits, through statutorily mandated setback lines, the construction of any permanent structure (including a dwelling), save a stall deck or walkway." (404 S.E.2d at 896). It is important to note that what is here involved is not the normal setback line which is regularly included in zoning ordinances, for such setback lines define the area within which development will be permitted, whereas the setback lines provided for in The Beachfront Management Act exclude development altogether, save for a small deck or walkway. Thus, if the Act is held not to constitute a taking, Lucas has paid $975,000 for land which he can use only in a transitory fashion and only for recreational purposes, and which, despite the Council's argument to the contrary, would be saleable to adjacent owners, if at all, only at a very small

fraction of the $975,000 which Lucas invested in the lots in the reasonable expectation that they could be developed as residences. Clearly, therefore, within this Court's decisions recognizing that a regulation which "denies an owner economically viable use of his land" (e.g.—*Keystone, supra,* 480 U.S. at 485), there has been a taking.

Conclusion.

Because review of The Beachfront Management Act should have been by intermediate scrutiny, because the relation between the means used to attain the ends sought to be achieved by that Act are much more questionable than any previously upheld by this Court, and because the statute has all but obliterated[6] the value of the Lucas property and Lucas' reasonable investment backed expectations when he bought the lots, the decision of the South Carolina Supreme Court should be reversed and the matter remanded for further proceedings under the proper standard.

Respectfully submitted,

BERNARD S. MEYER*
1505 Kellum Place
Mineola, NY 11501
(516) 741-6565

ERIC LANE
1505 Kellum Place
Mineola, NY 1501
(516) 741-6565

Attorneys for Amicus

[6]Indeed, Justice Harwell's dissent states that Lucas' appraiser fixed the present value of the lots as zero, 404 S.E.2d at 907 and that the Council's expert was unable to explain how he arrived at the conclusion that it had some value (*id*).

*Counsel of Record

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

David H. Lucas, *Petitioner*,

v.

SOUTH CAROLINA COASTAL COUNCIL, *Respondent*.

On Writ of Certiorari to the Supreme Court
of the State of South Carolina

BRIEF OF THE MEMBERS OF THE NATIONAL GROWTH MANAGEMENT LEADERSHIP PROJECT AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

JOHN A. HUMBACH
Counsel of Record
c/o Pace University
School of Law
78 North Broadway
White Plains, NY 10603
(914) 422-4239

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QUESTION PRESENTED FOR REVIEW

Does the Federal Constitution deny State legislatures the power to prevent public harm through the use of building restrictions that incidentally deprive some land of current market value?

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IN THE SUPREME COURT OF THE UNITED STATES
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David H. Lucas, *Petitioner*,

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On Writ of Certiorari to the Supreme Court of the State of South Carolina

---

BRIEF OF THE MEMBERS OF THE NATIONAL GROWTH MANAGEMENT LEADERSHIP PROJECT[1] AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTERESTS OF *AMICI CURIAE*

The National Growth Management Leadership Project (NGMLP) is an association of state and regional conservation and planning organizations[1] to encourage and promote comprehensive land use planning as a policy tool to address

[1] Greenbelt Alliance, Colorado Environmental Coalition, Hawaii's Thousand Friends, Natural Resources Council of Maine, Chesapeake Bay Foundation, New Jersey Future, 1000 Friends of Oregon, Pennsylvania Environmental Council, Save The Bay, South Carolina Coastal Conservation League, Vermont Natural Resources Council, and Washington Environmental Council join in this brief.

resource conservation, housing, transportation and other key public concerns. Its focus is on both comprehensive planning for urban areas as well as rural growth management issues affecting such resource lands as wetlands, shorelands, agricultural and forest lands and wildlife habitat.

A key question in this case is the extent to which the Takings Clause authorizes courts to rethink State legislatures' determinations to enact land use laws as measures to prevent serious public harms. Any reallocation of ultimate land-use authority from legislatures to the judiciary on the rationale of "regulatory takings review" would diminish legislatures' abilities to apply comprehensive planning techniques as a policy tool. The participants in the NGMLP are concerned that the resolution of the present case not, in its potentially broader sweep, jeopardize traditional and innovative comprehensive land-use planning techniques -- within the limits set down by this Court's "takings" decisions throughout this century.

This brief is filed on written consent, filed herewith, of all parties.

STATEMENT OF THE CASE

South Carolina's Beachfront Management Act (S.C. Code Ann. §§ 48-39-10 et seq.) prohibits Mr. Lucas from erecting any substantial structure on his two beachfront lots, essentially eliminating the land's current market value. Notwithstanding this impact, however, South Carolina's Supreme Court upheld the building prohibition, finding it to be within the States' longstanding legislative authority to forbid conduct that causes serious public harm. *Lucas v. South Carolina Coastal Council,* 404 SE2d 895, 899 (1991).

SUMMARY OF ARGUMENT

A State has unquestioned authority to prohibit, without compensation, property uses that injure others. The States' power to ban property uses deemed deleterious are upheld within a very "broad range."

This Court's decisions leave no doubt that public welfare can justify even a total destruction of property rights without compensation. It is well settled, for example, that the Takings Clause allows innocent owners' property to be forfeited *in toto* as a "defense" against detrimental use. Certainly, States can also apply the more limited means of merely forbidding the deleterious uses themselves -- even when doing so takes all current market value of some properties.

In any event, "all value" is not the same as "all use." None of this Court's modern "regulatory taking" cases has actually *held* a use restriction to be a "taking" solely because it removed all current market value (as distinguished from all *use*). Moreover, the States' land-use authority should not depend on current market conditions.

Most importantly, judicial review of the "takings" issue must not become a pretext for judicial reassessments of purposes and means selected by the States' legislatures. This Court's decisions support no such rethinking in the economic sphere. South Carolina's legislature concluded that the harmful effects of beachfront development justified a ban on that use. The law's incidental economic impact is not a cue for judicial intercession, nor is it prima facie proof that the legislature's weighing went awry.

The concept of socially detrimental land use fluxes and changes with changing social norms, knowledge and context. To preserve the legislative function to the legislatures, regulatory taking review should adhere to Justice Holmes' approach in *Pennsylvania Coal v. Mahon,* the case

that established the regulatory taking concept: So long as the purposes and means are valid, land use laws should be deemed "takings" only if they go so far that they are (as in *Mahon*) the generic equivalent of physical requisitions for public use.

ARGUMENT

South Carolina's beachfront building restriction essentially eliminates the current market value of Mr. Lucas' land. That impact does not, however, mean this Court should overturn the State legislature's determination to enact the restriction as a measure to prevent public harm.

POINT I.

The legislative power to restrict property uses extends, potentially, to all uses that have harmful impacts on other individuals or the public generally.

Restricting the uses that owners can make of their property is one of the primary ways that government carries out its essential purpose of preserving the general public welfare. *Keystone Bituminous Coal Assn. v. DeBenedictis,* 480 US 470, 491 (1987). In carrying out its governmental responsibility, a State has:

> "unquestioned authority to prevent a property owner from using his property to injure others without having to compensate the value of the forbidden use." *Keystone,* 480 US at 511 (Rehnquist, C.J., dissenting).

As Justice Stevens explained, writing for the majority,

> "since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the state has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity." *Keystone,* 480 US at 491, n. 20.

A key point of difference between the *Keystone* majority and dissent is how broad (or narrow) is this harm-prevention "exception" to the Fifth Amendment's compensation guarantee. US Const. Amend. V. Referring to it as the "nuisance exception," the dissenting Justices observed that it is not "coterminous with the police power itself," and the majority did not disagree. *See Keystone*, 480 US 491, n. 20, and 512 (Rehnquist, C.J., dissenting). But given that the "exception" is not coterminous with the State's "multifaceted health, welfare, and safety" powers, *id.* at 513, how broad is it?

1. The "Nuisance Exception" and Common Law Nuisances-- The very name "nuisance exception" suggests an exception to the Takings Clause guarantee that applies only to uses that are "nuisances" at common law, or something very close. *See Florida Rock Indus. v. United States,* 21 Cl.Ct. 161, 166-68 (1990) ("considered a nuisance"). *See also Lucas,* at 906 (1991) (Harwell, J., dissenting). Logically, to be sure, the common law of nuisance almost certainly establishes the *minimum* reach of the exception, for nothing is "taken" when legislation merely forbids the already forbidden. If, however, the governmental power to restrict land use were solely confined to uses considered nuisances anyway, land use legislation would be vastly more circumscribed than we know it today -- limited essentially to codifying the common law. The so-called "nuisance exception" is surely broader.

Thus, although the common law of nuisance has long been held to provide "a fairly helpful clew" in evaluating the validity of land use regulations, it is to be consulted "not for the purpose of controlling, but for the helpful aid of its

analogies. . . ." *Euclid v. Ambler Realty Co.*, 272 US 365, 387 (1926). The majority opinion in *Keystone* plainly acknowledged the exception's greater breadth when it used phrases such as "akin to a public nuisance," *Keystone,* 480 US at 488, "similar to public nuisances," *id.* at 492, and "nuisance-like," *id.* at 491, n. 20, to describe the kinds of land uses that a State can prohibit without paying compensation. It noted, moreover, that this Court had not in the past felt required to "weigh with nicety" the question of whether there was a nuisance according to the common law. *Id.* at 490, quoting *Miller v. Schoene,* 276 US 272, 280 (1928) (upheld uncompensated destruction of cedar trees to protect nearby apple trees owned by others). And it stated that "no individual has a right to use his property so as to create a nuisance or *otherwise* harm others." *Keystone*, 480 US at 491, n. 20 (emphasis added).

Clearly, in *Keystone,* as in so many previous cases, this Court did not regard the legislative power to restrict harmful uses to be limited to uses considered "noxious" or nuisances at common law. *See e.g., Renton v. Playtime Theatres,* 475 US 41, 54 (1986) (banning adult theaters on certain sites as "the essence of zoning"); *Andrus v. Allard,* 444 US 51 (1979) (trading in eagle feathers); *Agins v. Tiburon,* 447 US 255 (1980) (lots smaller than 1-5 acres); *Belle Terre v. Boraas,* 416 US 1 (1974) (six students in a house); *Goldblatt v. Hempstead,* 369 US 590 (1962) (mining gravel); *Perley v. North Carolina,* 249 US 510 (1919) (timber scraps left on ground); *Welch v. Swasey,* 214 US 91 (1909) (tall buildings); *Hudson Water Co. v. McCarter,* 209 US 349 (1908) (selling water interstate); *Powell v. Pennsylvania,* 127 US 678 (1888) (margarine); and *Mugler v. Kansas,* 123 US 623 (1887) (alcoholic beverages). On the contrary, so far as can be discerned from *Keystone* and these other precedents, the legislative power to restrict the use of property extends, potentially, to all uses that the legislature

deems likely to harm or injure other persons or the community as a whole.

Although the *Keystone* dissent acknowledged government's "unquestioned authority" to forbid property uses that "injure others," *Keystone,* 480 US at 511, the dissent seemingly ascribed a lesser range to this "exception." Describing it as a "narrow exception allowing the government to prevent 'a misuse or illegal use,'" *id.* at 512, the dissent quoted dicta from an "*arguendo*" discussion in *Curtin v. Benson,* 222 US 78, 86 (1911) (HELD: Secretary of Interior was not empowered to limit uses of private inholdings in Yosemite Park). Besides being dicta, however, the *Curtin* "misuse or illegal use" test is also circular: All uses banned by legislation are by definition illegal and, hence, misuses of property -- provided the legislation is valid, which is of course precisely the point at issue. To accept the *Curtin* dictum on its face would require affirmance of the decision below: Building houses on beaches in violation of South Carolina's Beachfront Management Act would be an *illegal* use and, hence, a misuse of land. S.C.Code Ann. § 48-39-170.

In sum, neither the *Keystone* majority nor the Court's other precedents (nor even, probably, the *Keystone* dissent) would confine legislatures' power to restrict land uses solely to nuisances at common law. Because nuisance law is so often invoked as a source of guidance, however, it becomes critical to ask: What exactly is the relation between the common-law nuisance, the police power and property rights?

2. Common Law Nuisances, the Police Power and Property Rights-- "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded. . . . The limits set to property by other public interests present

themselves as a branch of what is called the police power of the State." *Hudson Water Co. v. McCarter,* 209 US 349, 355 (1908) (Holmes, J.)

Some "nuisance regulations" exempted from the Fifth Amendment may have rested on "discrete and narrow purposes," *see Keystone,* 480 US at 513 (Rehnquist, C.J., dissenting), but the same can scarcely be said of the whole wide array of safety, health, aesthetic and even lifestyle objectives that have been validly advanced under the police power. *E.g., Penn Central Transp. Co. v. New York City,* 438 US 104 (1978) (aesthetics); *Belle Terre v. Boraas,* 416 US 1 (1974) (family lifestyle); and other cases cited in subd. 1 of this POINT I. The limits on property use under the common law of nuisance can likewise hardly be said to have "discrete and narrow" purposes. On the contrary, "[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.'" Prosser & Keeton, TORTS 616 (5th ed. 1984).

Though now mostly encompassed within specific statutory offenses, the historic range of public nuisance, as it developed over the centuries, grew to be essentially co-extensive with the police power itself. *See, e.g., Copart Industries v. Consolidated Edison,* 41 NY2d 564, 568, 362 NE2d 968, 971 (1977) (acts that "endanger or injure the property, health, safety or comfort of a considerable number of persons"); *Commonwealth v. South Covington & Cincinnati Street Ry,* 181 Ky. 459, 463, 205 SW 581, 583 (1918) (act or omission that "injuriously affects the safety, health or morals of the public"); SECOND RESTATEMENT OF TORTS, § 821B (2)(a) (public health, safety, peace, comfort or convenience). Already in 1256, Bracton was writing of "*nocumentum contra communem utilitatem*" (nuisance against the common welfare "which must always and in every case be preferred to the private"). 3 Bracton, DE LEGIBUS ET CONSUETUDINIBUS REGNI ANGLIAE 196 (Thorne ed. 1977).

At the time our Constitution's Framers were learning their law, public nuisance was being defined as "either the doing of a thing to the annoyance of the king's subjects, or the neglecting to do a thing that the common good requires." 4 Blackstone, COMMENTARIES 167 (1769). *Accord,* I Hawkins, PLEAS OF THE CROWN 197 (1724).[2]

Not only did the courts add new kinds of public mischief to the public nuisance list as needs arose but, from the 16th century onwards, but so did Parliament. *See generally,* Spencer, Public Nuisance--A Critical Examination, 48 Cambridge L.J. 55 (1989). One of the first *legislated* public nuisances was a land-use regulation forbidding cottages to be built on rural lots of fewer than 4 acres freehold. *See* 4 Blackstone, at 168. Violations of the London building code of 1666 were another of the early legislated public nuisances. 19 Car.2, c. 3, III, in 8 Pickering's Statutes at Large (1763).

Following the War of Independence, State legislatures replaced Parliament as the principal legislators in the public nuisance field. On the validity of such laws, this Court said that it was "clearly within the police powers of the State . . . 'to declare that in particular circumstances and in particular localities a [use affecting the "health and comfort of the community"] shall be *deemed* a nuisance in fact and in law.'"

[2] Even Locke, for whom "great and chief end" of government was "the preservation of . . . property," agreed that "political power [is] a right of making laws [with penalties] for the *regulating* and preserving of property". Locke, TWO TREATISES OF GOVERNMENT Bk II, §§ 124 & 3 (Everyman ed. 1991). "For it would be a direct contradiction," Locke noted, "for any one to enter into society with others for the securing and *regulating* of property, and yet to suppose his land . . . should be exempt from the jurisdiction of that government to which he himself, and the property of the land, is a subject." *Id.* at § 120. (All emphasis added.)

Hadacheck v. Sebastian, 239 US 394, 411 (1915), quoting *Reinman v. Little Rock,* 237 US 171 (1915) (emphasis added). Today legislatures usually make such public harms illegal without the circumlocution of actually denominating them as "public nuisances," but the principle is the same. No doubt influenced by the principle ***nulla poena sine lege*** ("no penalty without a statute"), essentially the entire "public order-common good" domain of common law public nuisance has been now embodied in specific police-power legislation -- subject to takings review.

The common law of *private* nuisance also affects and shapes the outer contours of property rights to use land. Like public nuisances, private nuisances also would hardly qualify as a "narrow and discrete" category of noxious or reprehensible conduct. *See generally,* Prosser & Keeton, at 619-33. To the contrary, "a nuisance may merely be a right thing in the wrong place, -- like a pig in the parlor instead of the barnyard." *Euclid v. Ambler Realty Co.,* 272 US 365, 388 (1926). In addition to depending on location, classifying conduct as a nuisance also depends crucially on whether "the gravity of the harm caused outweighs the utility of the conduct," Prosser & Keeton, at 630, or on an even more complex weighing of various factors that are normal concomitants of private nuisance tests. *See generally,* Lewin, Boomer and the American Law of Nuisance: Past Present and Future, 54 Albany L.Rev. 189, 212-14, 234-36 (1990).

Perhaps the only objective feature that all adjudicated private nuisances truly have in common is that the defendant's land use had effects that spilled over the property line causing harm to the plaintiff. Prosser & Keeton, at 619 ("The essence of a private nuisance is an *interference*") (emphasis added). Far from referring to a discrete class of inappropriate conduct, "nuisance, as a general term, describes the *consequences* of conduct, the inconveniences to others, rather than the type of conduct involved." *See Copart*

Industries v. Consolidated Edison, 41 NY2d 564, 568, 362 NE2d 968, 971 (1977) (emphasis added); *see also* SECOND RESTATEMENT OF TORTS, § 821A, Comment c ("as used in the Restatement, 'nuisance' does not signify any particular kind of conduct on the part of the defendant"). Reviewing numerous examples Dean Prosser concluded that "nuisance, in short, is not conduct, nor is it even a condition. It is the invasion of an interest, a type of harm or damage. . . ." Prosser, Private Actions for Public Nuisance, 52 Virginia L. Rev. 997, 1004 (1966). The common law of nuisance is not, in other words, so much a flat prohibition of harms as it is a multi-factored balancing process to decide *which* harms to prohibit.

3. States May Redefine "Rights to Harm Others"-- Since the question first arose a century ago, the elemental principle has been recognized that laws to prevent harm or injury are not takings. *Mugler v. Kansas,* 123 US 623, 665 (1887) ("all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community"). The principle was invoked by both the majority and dissenting opinions of *Keystone,* 480 US at 491, n. 20 and 511 (*see* quotations from both in first paragraph of this POINT I, *supra*). Yet, despite the two opinions' apparent agreement on the general principle, an important difference remained between them, a difference that sharply raises the question: Do *all* harms or injuries that a land use inflicts on others count as "harm" or "injury" for purposes of the principle? Or, are there categories of harm or injury that a State cannot constitutionally prohibit without paying compensation?

Legal rights to use property in ways that incidentally harm innocent others are well known in our law -- they are the essence of *damnum sine injuria*. Even quite substantial harms can be lawfully visited on others (for example, flooding neighbors by diverting surface water), or on the

community (demolishing an inspirational landmark; or smokestack emissions that cause acid rain), all depending on the policy judgments and choices reflected in the applicable law. *See, e.g., Johnson v. Whitten,* 384 A2d 698 (Me. 1978) (surface water); *Hatch v. W.S. Hatch Co.,* 3 Utah2d 295, 283 P2d 217 (1955) (noise, fumes, bright lights); *Bove v. Donner-Hanna Coke Corp.,* 236 App.Div. 37, 258 NYS 229 (1932) (heavily polluting coke plant across from residence).

More generally, the universe of such "rights to harm others" in connection with land use comprises the whole range of *damnum sine injuria* lying between a baseline of "zero" impact and the points at which, by common law or statute, a use's external impacts become actionable or indictable. Such a range of rights to harm is, as a practical matter, unavoidable. Valuable uses of land often have negative impacts on neighboring valuable uses or come into conflict with other private or societal goals. A legal rule that prohibited all such detrimental spill-overs would be not only highly impractical but, probably, an economic disaster. Therefore, when persons complain about negative impacts from others' land uses, there is often no sensible policy choice except to decide that, on balance, the public interest is best advanced by allowing the uses (*e.g.*, an important industry) despite their associated harmful effects on neighbors or the community at large.

Although property ownership must, as a practical matter, involve various incidental rights to effect spill-over harms, it surely does not follow that any such rights to harm should ever be constitutionally *inviolable*. On the contrary, the legislature needs be free to extend or withdraw such rights to harm others and, in effect, to reset the thresholds of "nuisance" as new conditions from time to time arise. To hold otherwise, that some harm-producing conduct is beyond State power to ban, except with compensation, is to deny State legislatures vital authority to respond in law to change.

It is the very essence of the legislative function to respond to the changing balance of societal needs with measures to protect the public welfare, even though there may incidentally be secondary effects on private wealth. *See* discussion in POINT III, *infra.* There is no supervening federal law of *damnum sine injuria* to backstop private owners' rights to engage in harm-producing uses of land. A legislature's decision to enlarge the list of forbidden detrimental conduct should be dispositive.[3]

POINT II.

A public purpose to prevent harmful uses of property can justify legislative measures that remove all current market value.

This Court's decisions leave no doubt that public welfare concerns can justify even a total destruction of property rights without compensation. Measures to protect public health are one example. *E.g., North American Cold Storage Co. v. Chicago,* 211 US 306 (1908) (confiscation of spoiled food); *see, e.g.,* 21 USCA § 673 (Supp. 1991) (authorizing seizure of adulterated meat, etc.). Public "emergency" situations are another. *Bowditch v. Boston,* 101 US 16, 18 (1879)

[3] Note that it does not necessarily follow as a corollary that, when the legislative purpose is to *benefit* the public, compensation is required. Such a so-called harm/benefit distinction is often described as illusory inasmuch as a given legislative act can usually be characterized equally well as both preventing harm and securing benefit -- there being no "benchmark standard of objectivity." *Loveladies Harbor v. United States,* 15 Cl.Ct. 381, 389-90 (1988). By contrast, *physical invasion* or permanent physical occupation is a kind of regulatory effect that is very distinct from a mere use restriction -- and one that virtually always requires compensation. *Nollan v. California Coastal Comm.,* 483 US 825, 831-32 (1987).

(blowing up a house to stop spread of fire). *See also United States v. Caltex,* 344 US 149, 154 (1952) (destroying terminal facilities in path of hostile forces), quoting *United States v. Pacific Railroad,* 120 US 227, 234 (1887) ("The safety of the state in such cases overrides all consideration of private loss"). Modifications of the medieval estate-system structure to meet twentieth century needs are still another. *Demorest v. City Bank Farmers Trust Co.,* 321 US 36, 48 (1944) ("The whole cluster of vexatious [ancient property intricacies] . . . is one whose history admonishes against unnecessary rigidity"). *See also Connelly v. Pension Benefit Guar. Corp.,* 475 US 211, 225 (1986) (upheld Act that "completely deprives").

1. Takings *in Toto* Justified by a Purpose to Prevent Detrimental Use-- A most important class of total takings to prevent detrimental use of property is the statutory forfeiture of land or chattels used in "undesirable" ways, as legislatively determined. *Van Oster v. Kansas,* 272 US 465, 467 (1926) (transporting liquor). "[T]his Court in the past has recognized the difficulty of reconciling the broad scope of traditional forfeiture doctrine with the requirements of the Fifth Amendment." *United States v. U.S. Coin & Currency,* 401 US 715, 721 (1971). The fact nonetheless remains that "legitimate governmental interests," or "legitimate purposes," *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 US 663, 688 and 690 (1974), can justify *in toto* takings despite extreme impingement on private property rights. To prevent use of narcotic drugs, for example, forfeiture can apply not just the to drugs themselves but, even more significantly, to the *innocent* owner's vessel in which the drugs were found. *Id. See also United States v. $8,850,* 461 US 555, 562 n. 12 (1983) ("important governmental purposes").

The government should not, of course, have to pay compensation when it confiscates such obviously "noxious"

contraband as narcotics, switchblade knives or homemade bombs. But legislative power to create new classes of contraband in order to prevent detrimental use is far more inclusive, extending to uses that are not especially "evil" at all *e.g.*, drinking alcoholic beverages, fishing with nets, or removing trash from San Francisco. *See, e.g., Van Oster v, Kansas,* 272 US 465 (1926); *Lawton v. Steele,* 152 US 133 (1894); *cf. Reduction Co. v. Sanitary Works,* 199 US 306, 311, 317-18 & 321 (1905). In short, forfeiture can be applied not only to prevent property uses that are malum in se but to malum prohibitum as well. *Calero-Toledo,* 416 US at 684; *see, e.g., United States v. $8,850,* 461 US 555 (1983) (entering U.S. with $8,850 and not notifying government); *Goldsmith-Grant Co. v. United States,* 254 US 505 (1920) (use of automobile in aid of tax evasion).

The reason that "inquiry into the guilt or innocence of the owner [can] be dispensed with" is that "state lawmakers, in the exercise of their police power, [are] free to determine that certain uses of property [are] undesirable" and then adopt confiscation as a "secondary defense against a forbidden use." *Calero-Toledo,* 416 US at 686. *Accord, Goldsmith-Grant,* 254 US at 513 ("It is the illegal use that is the material consideration . . . the guilt or innocence of its owner being accidental"). However one looks at it, statutory forfeiture is a clear modern example of the public interest justifying *in toto* takings of innocent owners' property irrespective of fault, breach of duty, wrongdoing or illegality on the owner's part.

2. Takings Merely of the Detrimental Use-- Although taking entire ownership interests can be quite effective as a "defense" against "undesirable" uses of property, legislatures normally choose less drastic measures. Relevant public welfare concerns usually can be served by taking merely the undesirable use itself, not ownership as a whole. Ordinary

land-use regulations and housing codes are obvious examples of these less drastic measures.

Even when legislatures take only the uses deemed socially detrimental, however, the result may still eliminate the current market value of some properties. An unsanitary tenement house, for example, can be unfit for human habitation under the local housing code and yet, due to high repair or demolition costs, it might have no other "economically viable use" either. *See, e.g., Tenement House Dept v. Moeschen,* 203 US 583 (1906), *affirming without opinion* 179 NY 325, 72 NE 231 (1904) (tenement owner ordered to replace outdoor privy with expensive indoor toilets). The State surely does not have to "buy" such an unfit structure in order to have it vacated -- a view sustained by this Court in affirming the *Moeschen* case *per curiam. Id. See generally,* J. Gilbert, Tenements and Takings, 18 Fordham Urban L.J. 437 (1991) (full background of *Moeschen* case).

The Beachfront Management Act has the same effect on Mr. Lucas that New York's Tenement House Law had on Mrs. Moeschen. In both cases, essentially all value was removed when the legislature banned certain uses that it determined to be socially deleterious. In both cases, too, the prohibited uses could be regarded, at least in the abstract, as respectable uses for their times (building on beachfronts or, in *1906,* operating a tenement house without plumbing). And in both cases the bans are justified by the respective legislatures' determinations that new knowledge and, perhaps, evolving social needs, values and progress had made uses that were once acceptable too detrimental to allow any longer.

Summing up to this point, the law is well settled that the Takings Clause allows innocent owners' property to be taken *in toto* as a "defense" against uses that the legislature determines to be socially detrimental. That being so, it would be anomalous if States could not also employ the more

limited means of merely forbidding the particular deleterious uses themselves -- even if, on occasion, those uses happen to account for the entire current market value of some properties affected.

3. "All Value" is Not "All Use"-- This Court's decisions "uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking.'" *Penn Central Transp. Co. v. New York City,* 438 US 104, 131 (1978). Indeed, as has been for many decades explicit, regulations can remove very large proportions of value and still not be compensable takings. *See Euclid v. Ambler Realty Co.,* 272 US 365 (1926) (75%); *Hadacheck v. Sebastian,* 239 US 394 (1915) (92.5%); both modernly cited with approval, *e.g., Penn Central,* 438 US at 125-26 and 131.

But what if the diminution of a property's current value approaches totality? Regulations that go "too far" may effect a taking. *Pennsylvania Coal Co. v. Mahon,* 260 US 393, 415 (1922). Does this mean that the incidental removal, by regulation, of the last few percentage points of current market value converts a valid exercise of the police power into a "taking" that requires the State to pay the *entire* market value?

No decision of this Court has, of course, ever given talismanic significance to the last few percentage points of current market value. Nonetheless, in recent years some have seen a basis for according such disproportionate significance to the last decrements of value in this Court's "economically viable use" criterion of taking. *Compare, e.g., Loveladies Harbor v. United States,* 21 Cl.Ct. 153, 160 (1990) (tidal wetlands: 99% reduction invalid), and *Florida Rock Industries v. United States,* 21 Cl.Ct. 161, 175-76 (1990) (freshwater wetlands: 95% reduction invalid), *with Hadacheck v. Sebastian,* 239 US 394, 405 (1915) (brickyard ban: 92.5% reduction upheld).

Since 1980, this Court has repeatedly stated that a land-use restriction effects a taking if it "denies an owner economically viable use of his land." *Agins v. Tiburon,* 447 US 255, 260 (1980). *See also, e.g., Keystone,* 480 US at 495; *Nollan v. California Coastal Comm.,* 483 US 825, 834 (1987). The 1980 *Agins* opinion was the first occurrence of the "economically viable use" formulation as such.[4]

This Court had no occasion in *Agins,* nor since, to actually *hold* a land-use restriction in violation of the "economically viable use" criterion. The question is still to that extent open whether the Takings Clause gives owners a minimum, inviolable economic guarantee. Some things, however, are clear: First, the Takings Clause does not assure an owner against reductions in value, or the most valuable use. *Andrus v. Allard,* 444 US 51, 66 (1979); *Goldblatt v. Hempstead,* 369 US 590, 592 (1962). Second, the Takings Clause does not necessarily assure the owner a financial profit. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.,* 458 US 419, 436 (1982); *Andrus,* 444 US at 66 ("loss of future profits . . . provides a slender reed upon which to rest a takings claim").[5] Third, regulations that deny an

[4] Just two years earlier, the counterpart prong of essentially the same two-part test was more tentative: "or *perhaps* if [the restriction] has an unduly harsh impact upon the owner's use of the property." *Penn Central,* 438 US at 127 (emphasis added).

[5] It is true, to be sure, this Court said in *Pennsylvania Coal Co. v. Mahon,* 260 US 393 (1922), that preventing a coal owner from mining the coal at a profit is "very nearly the same" as destroying it. But underground coal is an extremely atypical asset: Unless it is mined, it has no use at all. *Id.* at 414 ("For practical purposes, the right to coal consists in the right to mine it"). Extremely few kinds of property are so narrowly constrained in their usefulness -- and, most certainly, oceanfront land is not among them.

owner "all *use*" of his property (if not "all *value*") are highly likely to be viewed as regulatory takings. *See, e.g., Hudson Water Co. v. McCarter,* 209 US 349, 355 (1908) ("wholly useless," *per* Holmes, J.); *See also First English Evangelical Lutheran Church v. Los Angeles,* 482 US 304, 321 (1987) ("all use"); *Keystone,* 480 US at 513 ("all use") (Rehnquist, C.J., dissenting).

The Beachfront Management Act denies Mr. Lucas almost all of his lots' economic value, but the Act by no means denies all *use.* Removing literally "all use" would truly be the generic equivalent of a physical taking, reducing the ownership to an essentially theoretical status with no operational consequence in the real, physical world. Property "rights" are functionally gone once they cease to exist as matters of legal or any other significance. The same cannot, however, be said of regulations that merely remove current market value. Property rights that lack current market value not only can exist as matters of genuine significance but can even be highly prized by their owners. When a harm-prevention measure removes all value, that merely signifies that current potential buyers are only interested in acquiring the property for uses now regarded as too socially detrimental to allow.

This Court's modern "regulatory taking" cases do not, as noted earlier, contain any definite *holding* that land-use restrictions necessarily effect a compensable taking when they deprive some properties of current market value. (Indeed, *Calero-Toledo* and its "forfeiture" lineage are to the opposite effect, as discussed above.) There are, moreover, important reasons that counsel against adopting any value-oriented "takings" test that defines the scope of States' land-use authority in terms of current market conditions.

Many millions of acres of this nation's important natural resource lands (including the beaches and dunes of the present case) may, in their present natural condition, have

little commercial value by the standards of present-day markets. Thus, despite the potential cost to future generations, owners in our present generation often have an understandable temptation to displace important natural resource values in order to secure profit in the short-term. *See, e.g., Loveladies Harbor v. United States,* 21 Cl.Ct. 153 (1990) (tidal wetlands), and *Florida Rock Industries v. United States,* 21 Cl.Ct. 161 (1990) (freshwater wetlands). If the discourse on the long-term future of America's natural resources turns on nice distinctions about "all value" or "virtually" all value in short-term markets, the future will be, in the end, at the mercy of *transient market forces.*

What is at stake is our nation's ability to protect the natural resource base on which its vitality, economic viability, quality of life and natural beauty depend. During the past year or so the United States has been held liable for over $60 million to pay for "takings" that courts have held to occur as a result of national efforts to retain the natural character of a few hundred acres of alluvial valley floor and wetlands. *Whitney Benefits v. United States,* 926 F2d 1169 (Fed.Cir. 1991) (alluvial valley); *Loveladies Harbor v. United States,* 21 Cl.Ct. 153 (1990) (tidal wetlands), and *Florida Rock Industries v. United States,* 21 Cl.Ct. 161 (1990) (freshwater wetlands). By contrast, this nation has over 100 million acres of wetlands alone, less than one-half of the original total, but still an extraordinary amount of land if, to preserve it, the government would have to buy it all. *See* Zinn and Copeland, WETLAND ISSUES IN THE 102D CONGRESS, Congressional Research Service Issue Brief 91058 (9/12/91). Even if budget concerns were not an issue, there are others: There must be a better way to insure against shorted-sighted exploitation of posterity's patrimony than to put it all back in government hands.

Our free-market economy and private allocation of property have proved themselves unsurpassed as social tools

to achieve high living standards and a strong industrial base. These tools are not, however, flawless: Even the best market economy unavoidably suffers from "market failure," an inability to account properly for so-called external costs -- including the negative spill-overs from various land uses, and the tendency to discount excessively the rights of our descendants. No nation can disable itself from the defense of its resources, or leave them vulnerable to poorly planned development or badly executed utilization that may be prompted by short-term market conditions. Any rigid "economically viable use" guarantee under the Taking Clause would, however, do just that: It would make our elected legislatures' ability to restrain detrimental use of our American landbase constitutionally dependent on current market price.

POINT III.

The determination of whether, on balance, the harmful impacts from a property use justify forbidding the use is a decision that should be left to the legislature.

"Practically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference," SECOND RESTATEMENT OF TORTS, § 822, Comment g. A critical question of legal policy is which particular interferences should be prohibited and which ones, in the overall public interest, need to be allowed. *See* POINT I, subd. 3. The critical *constitutional* issue is which governmental forum ought to be deciding these questions of legal policy.

The constitutional tradition is clear: "Power to determine such questions, so as to bind all, must exist somewhere; . . . Under our system that power is lodged with the legislative branch of the government." *Mugler v. Kansas,*

123 US 623, 660-61 (1887). And "in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests." *Lawton v. Steele,* 152 US 133, 136 (1894). Still, a legislature's own "determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts." *Id.* at 137. It is the proper scope of this judicial supervision as applied to alleged "takings" that is the crux of the issue in this case.

1. **Traditional Scope of Judicial Supervision**-- The question of whether a land-use regulation is a taking is much like the legislative question of whether a particular harm-inducing land use ought to be prohibited (or allowed): Both "necessarily require[] a weighing of private and public interests." *Keystone,* 480 US at 492, quoting *Agins,* 447 US at 261; *compare* discussion in POINT I. The close interrelation of these two questions presents the constant risk that judicial review of the "takings" issue may turn imperceptibly into a rethinking of the purposes and means selected by the elected legislature. This Court's decisions do not, however, support any such rethinking of legislative determinations.

Accordingly, though "the legitimacy of [legislative] purpose is a question of federal" law, *Keystone,* 480 US at 512 (Rehnquist, C.J., dissenting), this Court's decisions make clear that "a *broad range* of governmental purposes and regulations satisfies these requirements." *Nollan v. California Coastal Comm.,* 483 US 825, 834-35 (1987) (emphasis added); *see* partial listing at POINT I, subd. 1, *supra.* The constitutional review of "purpose" goes not to whether the legislature's purpose was a wise choice, but solely to whether that purpose falls within the "broad range" of legitimacy. In this case, it appears not even controversial that the State's enunciated purposes to prevent the detrimental

safety, economic and environmental effects of beachfront development fall within the range. *Lucas,* 404 SE2d at 896-88. *See Agins,* 447 US at 261.

Similarly, judicial "inquiry into legislative purpose is not intended as a license to judge the effectiveness of legislation," the constitutional question being only whether the "Legislature *rationally could have believed* that the [Act] would promote its objective." *Keystone,* 480 US at 511 n. 3 (Rehnquist, C.J., dissenting), quoting *Hawaii Housing v. Midkiff,* 467 US 229, 242 (1984). At any rate, South Carolina could hardly have found any more direct means to preserve the natural safety, economic and environmental functions of its beaches and dunes than by banning artificial modifications in the critical zones.

2. **"Economic Impact" and the Revision of Legislative Judgments**-- Beyond assuring that legislative purposes fall within the "broad range" and that the means selected are rational, this Court has identified several other factors as having "particular significance" for takings questions, *viz.* "the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action." *Keystone,* 480 US at 495, quoting *Kaiser Aetna v. United States,* 444 US 164, 175 (1979).

The "character" and "reasonable investment-backed expectation" factors both tend to weigh against finding a taking in this case: The character of the regulation is in no sense a physical invasion, which usually demarks a taking; it is simply a restriction on use. *Keystone,* 480 US at 488 n. 18; *Penn Central,* 438 US at 124. As to the reasonableness of expectations, "those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Connelly v. Pension Benefit Guar. Corp.,* 475 US 211, 227 (1986). Shoreline development has been regulated in South Carolina

since 1977, long before Mr. Lucas bought his lots.

Although South Carolina's beachfront setback rule has an admittedly great "economic impact" on the current market value of Mr. Lucas' lots, it is no greater than the impacts in other cases where this Court has recognized that public interests can justify taking all use or ownership. *See* POINT II. Nor is the impact more extreme than the nature of the public interest requires. South Carolina's dunes and beaches, like many millions of other acres of America's remaining natural resource lands -- wetlands, tidelands, reservoir watersheds, alluvial valley floors -- generally present only two *practical* policy choices: Either regulate uses to prevent permanent loss of these lands' unique ecological character, or surrender their fate, and the quality of our descendants' national landbase, to the decisions of transitory market forces.

The South Carolina General Assembly decided that, on balance, the harmful effects of beachfront development were sufficient to justify a prohibition on such use, within certain lines. The "economic impact" question is, at bottom, whether this State legislative judgment should be overturned, at least for this case, because of its incidental effect to remove all market value from Mr. Lucas' lots. In other words, when a regulation's economic impact is very great, does it become the work of courts to re-exercise *de novo* that "large discretion" that is "necessarily vested in the legislature to determine . . . what measures are necessary" to protect public interests? *Lawton,* 152 US at 136 (emphasis added). Both precedent and practicality suggest not.

The precedents are, of course, the many cases discussed in POINT II, total takings for which this Court accepted, rather than re-weigh, the legislatively determined balance of interests. There are also, however, the practical concerns:

Knowledge, needs and values evolve with times and

circumstance and, in the process, the innocuous can become noxious, while the noxious grows benign. A hundred years ago, beer and margarine were legally noxious while Coca-Cola was made with cocaine. *See Powell v. Pennsylvania,* 127 US 678 (1888) (margarine); *Mugler v. Kansas,* 123 US 623 (1887) (beer); and *United States v. Housley,* 751 F.Supp 1446, 1447 (D.Nev. 1990) (cocaine). The valued wetlands of today were the noxious swamps, bogs and marshes of yesteryear. Beaches and riverbanks, once thought the perfect place for a house, are now viewed from the hindsight of disastrous floods in a very different way.

Thus, far from being fixed and timeless, the contours of "nuisance" shift and flux with ever-changing social norms, knowledge and context. *See* POINT I. Legislatures, facing regular re-election and constant constituent contact, are far better positioned than the judicial branch to exercise that "large discretion . . . to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests." *Lawton,* 152 US at 136. This is especially so in the economic sphere where "the fact is that virtually all economic regulation benefits some segments of the society and harms others." *Columbia v. Omni Outdoor Advertising,* 111 SCt 1344, 1352 (1991) (Scalia, J.).

The "reality [is] that determination of 'the public interest' in the manifold areas of government regulation entails not merely economic and mathematical analysis but value judgment." *Omni Outdoor,* 111 SCt at 1352. If legislative decisions to regulate objectionable land uses are "made subject to *ex post facto* judicial assessment of 'the public interest,' with personal liability of city officials a possible consequence, [this Court] will have gone far to 'compromise the States' ability to regulate their domestic commerce," *id.* -- and, one might add, to protect the viability of their domestic landbase.

That, precisely, is why "the constitutional power of the State to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs . . . [T]here are benefits from a great river that might escape a lawyer's view." *Hudson Water Co. v. McCarter,* 209 US 349, 356-57 (1908) (Holmes, J.). And the same may no doubt be said of a coastline.

In short, this Court may agree or not that South Carolina's beach setback rules are, on balance, justified by the potentially deleterious external impacts that they avert, or that the economic impact on Mr. Lucas is likewise justified. The question, however, is whether the Takings Clause enjoins this Court to reach *de novo* determinations on these points and then to substitute those new determinations (if different) for those of South Carolina's General Assembly.

So far as the historical evidence reveals, the Takings Clause was not originally intended to apply to mere restrictions on use at all. *See,* e.g., Treanor, The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment, 94 Yale L.J. 694, 711 (1985). Certainly no such intention was reflected in the legal institutions of our country's formative years. *See* Reznick, Land Use Regulation and the Concept of Takings in 19th Century America, 40 U.Chi.L.Rev. 854 (1973). As late as 1897, this Court was still firmly of the view, based on an "immense weight of authority," that taking required a "physical invasion of the real estate." *Gibson v. United States,* 166 US 269, 275-76 (1897), quoting *Transportation Co. v. Chicago,* 99 US 635, 642 (1878): "[A]cts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are *universally* held not to be a taking within the meaning of the constitutional provision." *Id.* (emphasis added).

The true origin of the regulatory takings law is Justice

Holmes' bold and brilliant judicial activism in *Pennsylvania Coal Co. v. Mahon,* 260 US 393 (1922). On the "particular facts" of the case, he discerned a degree of regulation that amounted to the functional equivalent of a taking, and he declared it such. *Id.* at 414 ("very nearly the same effect for constitutional purposes"). Notably, the balancing process that dominated the "substantive due process" part of Holmes' analysis (260 US at 412-414), played no role at all in his subsequent "takings" discussion (recently described by this Court as the "advisory opinion." *Keystone,* 480 US at 484). He simply treated as the generic equivalent of a physical taking that which, to all intents and purposes, had exactly the same effect as a physical taking.[6]

To preserve to State legislatures their essential legislative role to "determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety," *Mugler,* 123 US at 661, modern regulatory taking review should adhere to Justice Holmes' approach in the "takings" portion of *Mahon.* So long as the legislative purposes fit within the "broad range" of the legitimate and the means are rational, restrictions on use should not be deemed "takings" unless they are the full generic equivalent, in function and effect, of physical requisitions for public use.

Adhering to Holmes' approach, "takings" would of

[6] Justice Holmes' due-process effort to re-weigh the legislatively determined balance ("the public interest does not warrant much of this kind of interference") was, of course, quite normal "economic due process" analysis for the times -- the *Lochnerian* heyday of activist review, *Lochner v. New York,* 198 US 45 (1905) -- but it is quite contrary to modern "economic due process" standards of review. *See, e.g., Pennell v. San Jose,* 485 US 1 (1988); *Bowen v. Gilliard,* 483 US 587 (1987); *Day-Bright Lighting v. Missouri,* 342 US 421, 423 (1952) ("we do not sit as a super-legislature").

course include the entire originally intended ambit of the Takings Clause -- physically invasive impingements, in the guise of regulation or otherwise -- plus, at very least, a strong presumption of "taking" for regulatory actions like those this Court has previously found to be such. One obvious example would be a government regulation that utterly empties a property right of all operational consequence in the real world, so the right becomes effectively non-existent, precisely as occurred in *Mahon.* Another example would be a regulation whose wealth distribution effects are not merely incidental to legitimate public purposes but are, indeed, the very aim of the regulation. *See, e.g., Webb's Fabulous Pharmacies v. Beckwith,* 449 US 155 (1980) (state had authorized courts to simply retain interest earned on money deposited with them). *See also Nollan,* 483 US at 831 (requiring an owner to dedicate a public easement). And there is always the unfortunate possibility of governmental "misuse" of power, such as zoning to depress land values in anticipation of eminent domain, *see Urbanizorda Versalles v. Rivera Rios,* 701 F2d 993, 999 (1st Cir 1983) -- or, its near relative, an infringement that "utterly fails to further the end advanced as [its] justification." *Nollan,* 483 US at 837.

Recent decisions of this Court demonstrate clearly that, even with the traditional deference to legislatures' land-use purposes and means, the courts have ample room to address egregious cases. *See, e.g., Nollan,* 483 US at 838 ("this case does not meet even the most untailored standards"); and *Cleburne v. Cleburne Living Center,* 473 US 432, 448 (1985) ("the record does not reveal any rational basis"). The finer tuning of the land-use policy balance is, however, for the legislature. Standing alone, the fact that a public objective has extreme economic impacts on particular owners should not become a cue for judicial intercession, or prima facie proof that the legislature's weighing went awry.

The Framers placed their primary faith in elected legislatures, and it has become our basic constitutional assumption that, as times, needs and social values change, it falls within the classic province of elected legislatures to keep the laws attuned to the changing balance. To be sure, the legislature's own "determination as to what is a proper exercise of its police powers is not final or conclusive," *Lawton,* 152 US at 137. But it is true as well that "one branch of the government cannot encroach on the domain of another without danger. The safety of our institutions depends in no small degree on a strict observance of this salutary rule." *Powell v. Pennsylvania,* 127 US 678, 685 (1888). *Accord, Bowers v. Hardwick,* 478 US 186, 194-95 (1986).

CONCLUSION

The decision below of the Supreme Court of South Carolina should be affirmed.

Respectfully submitted,

JOHN A. HUMBACH
Counsel of Record
c/o Pace University
School of Law
78 North Broadway
White Plains, NY 10603
(914) 422-4239

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No. 91-453

In the Supreme Court of the United States

October Term, 1991

DAVID H. LUCAS

Petitioner,

vs.

SOUTH CAROLINA COASTAL COUNCIL

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

BRIEF OF CALIFORNIA CITIES AND COUNTIES AS AMICI CURIAE IN SUPPORT OF RESPONDENT

Carol Korade, City Attorney
City of Alameda
2263 Santa Clara Avenue
Room 314
Alameda, California 94501
(415) 748-4500

(List of Counsel Continued Inside)

Katherine E. Stone *
Philip A. Seymour
Freilich, Stone, Leitner & Carlisle
11755 Wilshire Boulevard,
Suite 1230
Los Angeles, California 90025
(310) 444-7805

* *Counsel of Record for the Amici Curiae*

Westside Law Publishers Los Angeles, California (310) 207-0272

54

LIST OF AMICI CONTINUED

Jack L. White, City Attorney
Eleanor M. Egan, Senior Assistant City Attorney
City of Anaheim

Judy Skousen, City Attorney
City of Arroyo Grande

Robin D. Faisant, City Attorney
City of Atherton

Gary T. Ragghianti, City Attorney
City of Belvedere

Manuela Albuquerque
City Attorney
Thomas B. Brown, Deputy City Attorney
City of Berkeley

F. Thomas Caporael,
City Attorney
City of Calimesa

Richard M. Manning, City Attorney
City of Capitola

Ronald R. Ball, Acting City Attorney
City of Carlsbad

Jimmy L. Gutierrez, City Attorney
City of Chino

Bruce M. Boogaard, City Attorney
City of Chula Vista

Leland D. Stephenson, City Attorney
City of Clovis

Jimmy L. Gutierrez, City Attorney
City of Coachella

William Camil, City Attorney
City of Commerce

Thomas A. Kathe, City Attorney
City of Costa Mesa

Robert Wellington, City Attorney
City of Del Rey Oaks

Daniel T. McCloskey, City Attorney
City of Dinuba

Allen E. Sprague,
City Attorney
City of Fremont

Scott H. Howard, City Attorney
City of Glendale

Roger Picquet, City Attorney
City of Grover City

Gail C. Hutton, City Attorney
Joseph Barron, Deputy City Attorney
City of Huntington Beach

David J. Erwin, City Attorney
City of Indio

Leland D. Stephenson, City Attorney
City of Kingsburg

Charles J. Williams, City Attorney
City of Lafayette

John Calhoun, City Attorney
City of Long Beach

Robert K. Booth, Jr., City Attorney
City of Los Altos

James K. Hahn, City Attorney
Anthony S. Alperin, Assistant City Attorney
City of Los Angeles

Robert Wellington, City Attorney
City of Marina

M. Dwain Smith, City Attorney
City of McFarland

Leland H. Jordan, City Attorney
City of Mill Valley

(LIST OF AMICI CONTINUED ON BACK INSIDE COVER)

AMICI CURIAE WILL ADDRESS THE FOLLOWING QUESTIONS:

1. Whether the State's actions come within the nuisance exception to the takings clause, and
2. Whether the State's actions amounted to a taking if it is determined that the location of the interim development setback line on Lucas' property was inappropriate.

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BRIEF OF CALIFORNIA CITIES AND COUNTIES AS AMICI CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICI CURIAE

Amici cities and counties, political subdivisions of the State of California, file this brief pursuant to Rules of the Supreme Court of the United States Rule 37. *Amici* have a vital interest in the legal issues presented by this case which affect the powers and responsibilities of state and local governments to regulate land use to prevent public harm. *Amici* have responsibilities for implementing state and federal legislation designed to protect lives and property — from hazards of flooding, earthquakes and as in this case, ocean waves.

Many cities and counties contain properties on which the values of common prudence and the desire to build are in direct conflict. California cities and counties in particular are likely to host steep, geologically unstable hillsides, beaches and ocean bluffs, earthquake faults and brush choked canyons whose natural cycles involve a major wild fire every 20 to 30 years. In other areas of the country natural flooding or unstable soils may pose similar obstacles to development. These obstacles do not necessarily discourage an owner's desire to build. Indeed, many potentially unstable sites, such as oceanfront or hillside land may be valued at a premium due to their views, privacy or other factors.

Whereas many buyers might fear the risks associated with such property, there will always be many who do not fear to tread, and are often willing to pay a premium for the opportunity. Often they will be encouraged by salesman, brokers or developers who can produce experts willing to dispute the local government's judgment that development

on the site is imprudent. Often enough there are grounds for legitimate scientific debate or disagreement, and the only thing that is certain is uncertainty.

If the government allows development in such situations, it is likely to be sued when things later go wrong. If it takes steps to forbid such development, it will be faced with claims like the one in this case. The only infallible judge in such situations is nature herself, and the verdict can be rendered only by the passage of time.

Amici would like to know how far they may go in regulating unsafe development; whether they may enact temporary — or permanent — bans on potentially unsafe development; and whether they may err on the side of public health and safety, without exposing themselves to ruinous claims of damages by individual property owners. The fiscal realities of local government do not permit health and safety regulation to proceed on a parcel by parcel basis. The choice presented to local governments may thus well be that of accepting substantial financial risks, or not regulating at all.

Amici submit that the decision of the South Carolina Supreme Court is correct. Because this Court's decision will have a direct effect on matters of grave importance to *Amici*, *Amici* respectfully submit this brief to assist the Court in the resolution of this case.

STATEMENT OF THE CASE AND THE FACTS

Amici adopt respondent's statement of the case and the facts.

SUMMARY OF ARGUMENT

The Fifth Amendment is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The Fifth Amendment does not guarantee the right to develop property for use which is unsafe, inconsistent with natural limitations on such use, or which exposes people to a significant risk of harm. Neither does the Fifth Amendment require the government to pay private property owners when government legislates to prevent such use. The South Carolina State Legislature found it necessary to restrict the building of permanent structures intended for human occupation in unstable coastal areas. The State Legislature's findings were not contested. Why then should the State of South Carolina be required to buy this property in order to prevent Lucas from using his property in a manner determined inherently unsafe and potentially damaging to himself and to others?

This case is not about whether government is immune from takings liability whenever its regulations advance *any* legitimate public purpose. This case is about (1) whether in order to prevent property owners from developing their land in a manner that exposes themselves and others to a significant risk of harm, the government must buy it; and (2) who is entitled to determine what uses of property pose a sufficient risk of harm that they should be prohibited — the courts or the legislatures.

The statewide regulations are not challenged in this case, nor is the methodology for establishing the interim setback line on Lucas' property. The state legislation provides remedies which enabled Lucas to receive a

development permit upon his success in the trial court, and also (as of June 1990) by administrative application. There appears no question that if the property can in fact be safely developed, Lucas will be able to fully achieve his original "investment backed expectations." Under these circumstances, *Amici* believe that the Court cannot find that the State's actions constitute a "taking," permanent or temporary.

ARGUMENT

I.

THE STATE'S ACTIONS COME WITHIN THE SO-CALLED "NUISANCE EXCEPTION" TO THE TAKINGS CLAUSE

A. The Question Presented Is Whether The State May Prohibit Unsafe Development On Property Subject To Substantial Natural Hazards, Not Whether The Government May Appropriate Private Property For The Public Or Prohibit All Use Of Property.

The question presented in this case is whether the "nuisance exception" authorizes the government to prohibit, in a proper case, the building of permanent structures on certain property, without paying compensation. Petitioner essentially asks this Court to recognize an *exception* to the "nuisance exception," and to hold that there exists an absolute right to place permanent structures on property, regardless of the potential risks of harm.

1. The State Interest In Question Is the Prevention of Unsafe Use of Property.

Contrary to petitioner's framing of the issue, no one contends that *any* legitimate public purpose may justify the relatively drastic use restrictions at issue. This is purely a straw man. The South Carolina Supreme Court quite clearly articulated that the basis for its decision was the "nuisance exception" recognized in prior decisions of this Court.

This is also not a case about public benefits accrued at the cost of private property rights. It is about a building restriction imposed primarily to protect public safety, above all that of petitioner, his family and future owners of the subject property.

To be sure, the legislative purposes articulated and served by South Carolina's coastal act are broad. It may also be true that the public will coincidentally benefit from better views or a wider beach as a result. Nevertheless, the primary function of the particular regulation at issue here must be viewed simply as prevention of unsafe development. The legislative findings accompanying the act specifically note that, "Consequently, without adequate controls, development unwisely has been sited too close to the [beach/dune] system." App. 99, § 48-39-250(4). The state legislature also found that efforts to protect such development through artificial means have proven ineffective, and have in many cases increased the danger of wave damage both to the owners and others. App. 99, § 48-39-250(5). The legislature concluded that it was in both "public *and private* interests" to preclude further development within the area subject to natural beach erosion. App. 99-100, § 48-39-250(6). Section 48-39-260(1)(a) also declares preservation of the

beach/dune system is necessary, *inter alia*, for "protection of life and property by acting as a buffer from high tides, storm surge, hurricanes, and normal erosion." App. 102.

The setback line, seaward of which development may not take place, is calculated by estimating 40 years worth of erosion, or imposing a minimum setback of 20 feet from the existing baseline. App. 110-114, § 48-39-280. The minimum 20 foot setback is premised on the not unreasonable assumption (in fact, a well documented fact) that storm conditions may produce erosion well beyond the highwater mark. It can be argued that this approach is cautious with respect to properties such as Lucas'. Nevertheless, the clear intent is to prevent development in the "buffer zone," *i.e.*, precisely where it is exposed to damage from the ocean, whether by direct wave attack, the undermining of foundations by sand erosion, or other means.

Nothing in the State's regulations purports to grant the public an interest in the lands so restricted, or otherwise alter their ownership status. The setback regulations do serve to limit potential public harm. The legislature found that improperly sited development may actually increase danger to other properties, and aggravate the problems of beach erosion, and resulting damage to public and private resources. App. 99, § 48-39-250(4). The regulations prevent development where it is likely to become a hazard to its neighbors. The restrictions also serve to limit the amount of community-wide damage which may be sustained in a natural disaster, thus reducing the chances of overload and breakdown of public rescue, relief and rehabilitative resources. However, the most important effect is to prevent the owner himself from becoming a victim.

2. The Sole Attribute of Ownership Actually Affected by the Regulations is the Right to Develop the Property for Permanent Structures Intended for Human Occupation.

Although the restrictions placed on development of petitioner's land are severe, it must be acknowledged that they affect only one fundamental attribute of ownership — the right to develop for a particular *use*. Petitioner retains full ownership of the property and the right to exclude others. *Cf. Kaiser Aetna v. United States*, 444 U.S. 164, 177 (1979). There has been no physical invasion or appropriation of plaintiff's land. *Cf. Nollan v. California Coastal Commission*, 483 U.S. 825, 832 (1987). Petitioner retains the right to sell or bequeath the property. *Cf. Hodel v. Irving*, 481 U.S. 704, 715 (1987); *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979).

As to *use*, the right to build permanent structures was foreclosed. Even that absolute prohibition was temporary, however, as the State amended its regulations in June 1990 to permit owners in Lucas' position to apply for development permits under specified restrictions. App. 125, § 48-39-290(D). Before that, a judicial remedy was available if the regulations were unreasonably applied. Even during the temporary prohibition petitioner retained the full right to use his property for the most traditional use of land in its class, *i.e.*, beachfront recreation. The "taking," if any, results only from the State's interference with the "right" to build on the land. Whether there is any absolute "right to build," and whether denial of this particular "property right" necessarily amounts to a taking, are the issues presented.

B. The State Is Not Required To Compensate Private Property Owners For Protecting Their Safety Or Preventing Serious Public Harm.

1. Yes, There Is a "Nuisance Exception".

Petitioner suggests that there is in fact no "nuisance exception" to the Fifth Amendment's compensation requirement, and that the "nuisance exception," by virtue of its historical origins, properly applies only in cases involving alleged due process violations. Past decisions of this Court do not support this contention. Certainly this Court recently found the "nuisance" rule alive and well in *Keystone Bituminous Coal Assoc. v. DeBenedictus*, 480 U.S. 470 (1987). The majority in *Keystone* would have immunized the challenged regulations from takings liability under the nuisance exception. *Id.* at 489-492. The four dissenting justices did not question the existence of a "nuisance" rule: "We have recognized that a taking does not occur where the government exercises its *unquestioned authority* to prevent a property owner from using his property to injure others without having to compensate the value of the forbidden use." *Id.* at 511, emphasis added (Rehnquist, dissenting). Rather the dissent believed that the regulations at issue went beyond the scope of the "nuisance" exception as previously interpreted by this Court, and would have analyzed the challenged regulations under a traditional balancing test. *Id.* at 512.

In *First English Evangelical Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), this Court similarly gave recognition to the nuisance exception by specifically reserving to the state court the question of "whether the county might avoid the conclusion that a

compensable taking had occurred by establishing that the denial of all use was *insulated as a part of the State's authority to enact safety regulations*." *Id.* at 313, emphasis added.[1] In view of these recent statements by this Court, the virtually universal recognition of the "nuisance" rule by state and the lower federal courts need not be belabored.

2. A Prohibition on Unsafe or Unreasonable Use of Property Falls Within the Constitutional Principles Associated With the Nuisance Exception.

In the context of this case the term "nuisance exception" may be misleading. A "nuisance" is often defined as an activity or use of property which unreasonably interferes with the use and enjoyment of the property (public or private) of others. *See* California Civil Code § 3479. For Fifth Amendment purposes, however, it is clear that the "nuisance exception" is not coterminous with the common law notion of nuisance, but extends to any activities deemed unreasonably harmful to the public. *Mugler v. Kansas*, 123 U.S. 623, 665 (1887); *Miller v. Schoene*, 276 U.S. 272, 279 (1928); *Lawton v. Steele*, 152 U.S. 133 (1894).

It is also clear that the constitutional notion of "nuisance" extends to activities that are dangerous or unhealthful to the landowner himself, regardless of whether

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[1]The state court on remand concluded that the moratorium in that case was necessary to prevent harm to people and property. *First English Evangelical Church of Glendale v. County of Los Angeles*, 210 Cal.App.3d 1353, 1363 (1989), *cert. denied*, 493 U.S. 1056.

this harm may be extended to the general public.[2] This Court has never suggested that a landowner may freely engage in hazardous or illegal activities, violate building codes or ignore health laws simply on a showing that any ill effects will be confined to the premises. Thus an unsafe building may be condemned, and it is constitutionally irrelevant that the owner lacks the resources to replace the structure with a new one. *E.g., MacLeod v. City of Takoma Park*, 257 Md. 477, 263 A.2d 581, 584 (Md. 1970). The same power must necessarily extend to the prohibition of structures which are deemed inherently unsafe due to natural hazards or conditions.

[2]Petitioner suggests that regulation directed primarily at protecting the owner from his own folly smacks of paternalism, and, on the scale of constitutional values, cannot be used to justify a prohibition on development. This argument reduces itself to the absurd proposition that the public, through its government, must pay the individual for the privilege of preventing him from building his home where the roof may collapse on his family, or that of a subsequent purchaser, during the next storm, earthquake or other natural calamity. Despite this nation's deep rooted attachment to individual freedoms, it has not been found unconstitutional to deny the individual the right to inflict potential harm upon him or herself through the pursuit of hazardous activities, the personal use of drugs, impure water or food, experimental medicines or even alcoholic beverages. The Fifth Amendment does not carve out a special "property rights exception" for human folly.

3. No Compensation Is Required Where the Government Restricts Unsafe Development Because Such Action Does Not Result in Denial of Any Actual Property Right Protected by the Constitution.

The "nuisance exception" is best understood as not an "exception" to general rules, but rather as integral to the Fifth Amendment concept of a "taking of property". The government is not required to pay "just compensation" for a prohibition on unsafe or unreasonable uses of land because by prohibiting such uses, it has not deprived the owner of any property right or reasonable expectation which was his to begin with.

a. The reach of the Fifth Amendment is limited to government action which denies legitimate property rights.

The Fifth Amendment does not provide an all-purpose cure for perceived inequities of governmental regulation. By its express terms, the Amendment requires compensation only where private "*property*" is taken "*for public use*". The Takings Clause was originally interpreted — probably exactly as the original framers intended — quite literally. "That provision has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power." *Legal Tender Cases*, 12 Wall. 457, 79 U.S. 475 (1870). As late as 1922 this Court held in *Omnia Commercial Co. v. United States*, 261 U.S. 502, 510 (1923), that the Takings Clause provided no relief for the "destruction," as opposed to appropriation, of private property.

With the rise of pervasive government regulation — an event likely unforeseen by the framers of the Fifth Amendment — this Court initially looked primarily to the due process clauses of the Fifth and Fourteenth Amendments for a constitutional remedy for excessive regulation. *See, e.g., Nectow v. City of Cambridge*, 277 U.S. 183 (1928); *Miller*, 276 U.S. 272, 280; *Hadacheck v. Sebastian*, 239 U.S. 394, 348 (1915).

Since *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the Takings Clause has assumed a leading role in the protection of property rights. Indeed, this Court has given an expansive interpretation of the Takings Clause, holding that the essential principle is one of "fairness and justice" in allocating public and private burdens. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 125 (1978); *see Armstrong*, 364 U.S. 40, 49 [Fifth Amendment is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"]. Nevertheless, the Fifth Amendment does not — as some appear to argue — invest the courts with an all-purpose equitable jurisdiction over the other branches of government. An indispensable element of any taking — regulatory or otherwise — is the damage or destruction of *property*, or, more precisely, with the "bundle of rights" associated with property ownership. Absent such an interference, there is no "taking." *United States v. Willow River Power Co.*, 324 U.S. 499, 502 (1945); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005-1006 (1984). Thus this Court has often "dismissed 'taking' challenges on the ground that, while the challenged government action caused economic harm, it did not

interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute property for Fifth Amendment purposes." *Penn Central*, 438 U.S. 104, 124-125.

b. Property rights themselves are limited by concepts of reasonableness.

The Fifth Amendment also does not *create* property rights, nor unreasonable expectations based on ownership of property. *Webb's Fabulous Pharmacies*, 449 U.S. 155, 161. This Court has also long recognized that property rights are themselves creatures of law, and primarily state law at that. *Ruckelshaus*, 467 U.S. 986, 1001. To be protected, an owner's expectations must normally have "the force of the law behind them." Beyond this, however, the owner's expectations must be reasonable in view of the facts of nature and particular circumstances of his land.

c. The "nuisance exception" simply marks a limitation on the scope of "property rights" protected by the Fifth Amendment.

The essence of the "nuisance exception" is simply a recognition that the "bundle" of rights inhering from property ownership does not include the right to use property in a manner which is unsafe, hazardous, or injurious to others. "Long ago it was recognized that 'all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community.'" *Keystone*, 480 U.S. 470, 492, citing *Mugler*, 123 U.S. 623, 665. This exception does no more than recognize an inherent limitation on the notion of property itself. There is no inherent right to use property in a manner unreasonably injurious to others, or violative of basic safety

regulation. An individual cannot, by spending money, buy immunity from legislative judgments regarding basic questions of public and private safety and welfare.[3] Thus, by barring a nuisance or other unreasonable use of property, the government does not deprive the landowner of any property or other *right* he has ever possessed, and the property owner has therefore had nothing taken.

d. There is no constitutionally recognized property right to make an unreasonable or unsafe use of land.

A necessary consequence of the foregoing is that there is no absolute right to construct permanent improvements on unsuitable land. Certainly the right to use land is among the most important strands of a property owner's "bundle" of rights. Ordinarily this right would appear to include the right to make reasonable improvements on the land. But this right is subject to the "nuisance" limitation. The Constitution may proscribe excessive regulation, but it does not require the government to ignore the limitations placed on prudent development of property by nature.

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[3]*See Nollan*, 483 U.S. 825, 837:

> "While a ban on shouting fire can be a core exercise of the State's police power to protect the public safety, and can thus meet even our stringent standards for regulation of speech, adding the unrelated condition alters the purpose to one which, while it may be legitimate, is inadequate to sustain the ban. Therefore, even though, in a sense, requiring a $100 tax contribution in order to shout fire is a lesser restriction on speech than an outright ban, it would not pass constitutional muster."

Were Lucas' parcels located on a glacier, on the slopes of an active volcano or astride an earthquake fault, there would be no question of any "right to build." The result would be the same were the property located on an active river floodplain or an unstable hillside, there would be no question of a "right to build" at all. *Adolph v. Federal Emergency Management Agency*, 854 F.2d 732, 739 (5th Cir. 1988) [floodplain]; *Maple Leaf Investors v. State Dept. of Ecology*, 88 Wash. 2d 726, 565 P.2d 1162 (Wash. 1977). By denying the right to place improvements on such land the government does not "take" property; it merely confirms the limitations placed by nature. It is true that in doing so, the government may impose its judgment regarding safety and the severity of natural conditions over that of the property owner. This however, is a proper function of government and, if exercised within the bounds of reason, does not violate the Fifth Amendment.

The risks of construction on petitioner's property may also be less self-evident than in other situations. However, petitioner has nowhere challenged the state legislature's findings or conclusions, contended that the setback line is improperly drawn with respect to his property, nor provided evidence which would allow a summary override of the legislature's conclusions. In a proper case, an individual in Lucas' shoes might be able to establish that the legislature's judgments were utterly contrary to established scientific evidence, or wholly inapplicable to his property. Here, however, petitioner has provided no basis for challenging the government's "unquestioned authority" (*Keystone*, 480 U.S. 470, 511) to establish and enforce safety standards for its citizens.

e. An otherwise unreasonable use of land need not be permitted solely to preserve a market value.

Petitioner poses the issue whether the State may *ever* deprive his land of all "value," meaning, presumably market value, without paying compensation, regardless of its purpose. Petitioner also appears to suggest that any property for which he paid several hundred thousand dollars simply cannot come within the nuisance exception.

If it comes down to it, *Amici* believe that the nuisance exception does permit government to extinguish all "economic" value in a piece of land, if it is marketable for no use which does not pose a serious risk of harm to its owner or others. Examples of hazardous property abound in nature. Government cannot be barred from restraining unsafe development of such properties simply so that the owner may market it to the adventurous.

More fundamentally, however, this is not a case in which all "value" has been denied. Petitioner errs in equating the right of ownership and reasonable use — which the Fifth Amendment clearly protects — with economic or market value. To be sure, market value is the commonest measure of property value, for reasons long-ago stated in *Kimball Laundry Co. v. United States*, 338 U.S. 1, 6-7 (1949). However, market or economic value is ultimately merely an indicator of value, not value itself. Certainly the absence of any ascertainable market value does not relieve the government from paying just compensation where value exists. Neither does the absence of market value necessarily and automatically indicate that government regulations have gone "too far." This merely begs the questions of what uses — marketable or

otherwise — remain, and whether the restrictions are excessive in terms of what uses of the property are reasonable to begin with. For reasons already stated, the uses desired by petitioner may be deemed unreasonable by the State.

Any argument based on economic value ultimately proves too much. Certainly the market is capable of creating a value for virtually any attractive property, with the price set by discounting attractiveness with risk. Lucas' experience indicates that there certainly may be a market for risky properties, and one suspects that there would remain a market (albeit a lower price) for Lucas' property were it located 30 feet instead of 300 feet from the present high water mark. However, the Constitution permits the State to abolish a market where none ought to exist. *See, e.g., Mugler*, 123 U.S. 623, 663. This principle must apply to real property as any other. Indeed, Lucas' situation resembles none so much as that of the owner in *Andrus*, 444 U.S. 51, who was left with the right to possess and enjoy, but not to resell his property.

C. The State's Prohibition On Building Within An Area Subject To Major Storm Damage and Beach Erosion Falls Within The Nuisance Exception.

All elements necessary to support application of the "nuisance exception" are present in this case. The state legislature reasonably determined that the band of shoreline property which includes petitioner's parcels is subject to natural forces which make construction of permanent dwellings unsafe. Petitioner has not challenged the legislative judgment on this matter; indeed, he has conceded the validity of the regulations. It may be that Lucas can

obtain an exception under the provisions of the act as amended in 1990; *Amici* do not contend that the government must forbid unwise uses of land, but only that it may. Petitioner has not shown that the State's initial determination, however, was arbitrary, unreasonable, or beyond the proper bounds of government's authority to protect public and private safety.

D. The Legislative Branch Of Government Is Properly Charged With the Primary Authority To Determine Which Uses of Land Are Unreasonably Hazardous Or Injurious To The Public To Merit Prohibition.

It must be acknowledged that the "nuisance exception" is a limited doctrine, and one which is potentially subject to abuse. Clearly the "nuisance exception" is not "coterminous with the police power itself." *Keystone*, 480 U.S. 470, 512 (Rehnquist, dissenting). The question remains as to which branch of government — the legislative or judicial — has the principle authority to determine which uses of property are sufficiently unsafe or injurious that they transcend the bounds of reasonable use of property.

1. Determination of Unsafe or Unreasonably Injurious Uses Has Traditionally Been a Matter for the Legislative Branch.

This Court has historically granted the legislative branch of government the primary role in defining which harms or ill effects are sufficiently substantial and detrimental as to justify actual prohibition. In *Mugler*, for example, this Court noted:

> "[a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or appropriation of property." *Mugler*, 123 U.S. 623, 668-669.

Since *Mugler*, this Court has often restated the importance of deference to legislative judgments in matters affecting the public health and welfare. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 392-393 (1926); *Berman v. Parker*, 348 U.S. 26, 33 (1954); *Agins v. Tiburon*, 447 U.S. 255, 261 (1980); *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 55-56 (1976); *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 53 (1986). The same considerations underlying these decisions remain valid today.

2. The Legislative Branch Is Better Equipped to Conduct Necessary Factual Inquiries and Establish Public Safety Standards.

The legislative branch is far better equipped to gather, weigh and balance scientific, historical and other factual data than the court system, which is bound by the narrow spectrum of facts presented to it by advocates of varying means and intentions. This case illustrates the wisdom of this policy. There appears no question that the legislative decision to establish setback lines came in the wake of lengthy consideration of available scientific and historical data, and hard consideration of alternatives. There is no reason to believe that property owners or other citizens adversely affected were deprived of the opportunity

to fully present their competing interpretations of scientific facts and realities.

The question of what is unreasonably hazardous or unreasonably injurious to others is also inherently a matter of policy judgment as well as factual considerations. Clearly these questions are properly the province of the legislature rather than the courts. Opinions may differ, for example, as to whether homes should be permitted in a zone subject to catastrophic flooding once every 100 years, or whether owners should be entitled to risk floods occurring at a frequency of every 50 years. Similar considerations are involved in determining how far homes must be set back from an active earthquake fault, an unstable cliff, or — as in this case — an active beach. Clearly this is not a question which can be left to case by case resolution in the trial courts, nor is it a matter on which the courts are equipped or intended to resolve policy for society.

3. Case by Case Adjudication Cannot Be Substituted for Legislative Judgment.

The facts of this case confirm the pitfalls of entrusting plenary review powers in the courts. There was, and is, no claim that the State's objectives were unreasonable, or that the building setback line was arbitrary or unsuited for its purposes in light of applicable scientific principles. Nevertheless, the trial court apparently felt that the Fifth Amendment entitled it to conduct an entirely independent judgment on validity of the State's concerns.

At trial petitioner relied almost exclusively on the fact that his property is *currently* well removed (approximately 310 feet) from the highwater line, and that the area historically is accreting rather than eroding. In addition, Lucas offered his personal opinion that he

considered the risk of selling or building on the property acceptable. In reply, the State produced unrebutted expert testimony that the shoreline is inherently unstable; that major erosional events are to be expected and that these events may erode the shoreline by as much as 300 feet in an episode; that petitioner's property was under water as recently as 1963 and nearby properties were damaged by wave action in 1983; and that there are no assurances that petitioner's property is safe. The historic accretion process relied upon by petitioner is very much a case of two steps forward, one step back, and the backward steps may be sufficient to endanger petitioner's property. Despite the evidence, the trial court concluded that petitioner's two parcels were "suitable" for development. There is no analysis of the actual facts regarding risk to the property.

Another trier of fact might well have found that the State plainly established a reasonable basis for regulation. Ultimately the Atlantic Ocean, and neither the legislature nor the courts, nor individual property owners, will determine whether Mr. Lucas' property remains "suitable" for a home. But neither the government's power to establish safety standards nor application of the Fifth Amendment can be made to depend on hindsight.

4. The Courts May Prevent Abuse of the "Nuisance" Doctrine Through Traditional Review of Legislative Judgment.

Certainly private owners should not be without remedy against unreasonable government regulation. But a remedy exists. The courts retain authority to override legislative dictates that are arbitrary, capricious or entirely lacking in factual basis. This rule applies equally to any

attempt by the government to label as unsafe or injurious that which, in the light of scientific fact, is not. In this case, the Court need not consider whether concerns beyond those traditionally recognized by the "nuisance exception" may justify a ban on permanent construction. It may be assumed that regulations which further only considerations less pressing than health, safety or (perhaps) the conservation of essential public resources remain subject to the traditional analysis stated in past cases.[4] The remedy, however, does not lie in merely showing a deprivation of use, without any showing that the deprivation is beyond the scope of the government's power to protect health and safety.

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[4] *Amici* do reject any argument that the "nuisance exception" may be defined exclusively by past case law. *See, e.g., Keystone*, 480 U.S. 470, 512 (Rehnquist, dissenting). Past adjudication is relevant, but cannot provide the exclusive answer.

It must be acknowledged that both social values and scientific understanding are subject to change. As the principles of geological and ecological causation become better understood, it is inevitable that activities once thought benign may be discovered to be the actual root of significant harms. Advances in the field of medicine, for example, have vastly expanded our field of understanding, and correspondingly provided grounds for regulation of many activities previously thought harmless. In the field of geology and ecology, results once thought inevitable and unavoidable consequences of natural processes may be traced to man-caused roots.

Adjudication follows rather than precedes the development of knowledge as a whole. The conception of "nuisance" cannot be made to rest on past decisions alone. The Legislature's prerogative — perhaps duty would be a closer description — to prohibit damaging uses of property is not abated because the harm is a new one, or the regulations based on a more modern understanding of natural cause and effect. Such exercises of the police power do not require the payment of compensation any more now than they did 100 years ago.

II.

THE STATE'S ACTIONS HERE DID NOT AMOUNT TO A TAKING, PERMANENT OR TEMPORARY, OF LUCAS' PROPERTY, EVEN IF IT IS DETERMINED THAT THE LOCATION OF THE INTERIM SETBACK LINE ON LUCAS' PROPERTY WAS INAPPROPRIATE

If the Court determines that the State's actions were not immune under the "nuisance exception," it must still determine whether the State's actions amounted to a taking. *Amici* believe that in view of the totality of considerations, there was no taking.

A. No Permanent Taking Has Occurred; Lucas Can Apply For A Variance.

While a regulatory misstep may require the government to pay "just compensation," the Fifth Amendment does not require the government to become an involuntary substitute for the free market. In *First English*, 482 U.S. 304, this Court made it clear that the remedy for government overregulation is not an automatic involuntary purchase (or, from the owner's perspective, forced sale) of the property. "Once a court determines that a taking has occurred the government retains the whole range of options already available — amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain." *Id.* at 321. The state statutes in this case specifically provided the state coastal council with the authority to issue a building permit to Lucas upon a finding that a taking had occurred as a result of application of the setback regulations. App. 132, § 48-39-305(B).

Subsequent to the trial the State further enacted a formal administrative variance procedure which would permit Lucas, and others similarly situated, to apply for development approval. App. 125, § 48-39-290(D). Until this permit procedure has been utilized there has been no permanent taking. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126-127 (1985); *Williamson County v. Hamilton Bank*, 473 U.S. 172, 185-186 (1985).

Plainly no permanent taking occurred in this case.

B. On The Facts Presented There Was No Temporary Taking.

In view of the 1990 amendments to the state coastal act, the dissenting justices of the South Carolina Supreme Court would have affirmed the alleged "taking" in this case, and remanded the matter to the state coastal council for permit hearings. The majority did not consider the question of a "temporary taking." If the judgment is not affirmed in its entirety, the appropriate course of action would appear to be a remand for consideration of this issue. Such a recommendation is included in the brief of the Solicitor General.

However, *Amici* believe that this Court may find that there was in fact no temporary taking. The prohibition on development of Lucas' property was not lengthy. It endured for thirteen and one-half (13½) months, *i.e.*, from the July 1, 1988 effective date of the legislative restrictions until August 10, 1989, when Lucas prevailed in the trial court and the coastal council was vested with authority to issue him a building permit. Alternately, the restriction endured approximately two (2) years, *i.e.*, until 1990, when Lucas became entitled to apply for permits under the 1990 amendments to the state coastal act. Lucas bought one

property strictly for resale, and the other for his personal residence. There is no indication that the long-term property values have been damaged or that the net delay in developing or reselling the properties has seriously eroded Lucas' "investment backed expectations." *Amici* believe that these facts, considered in light of relevant circumstances, do not demonstrate a sufficiently serious interference with property rights as to amount to a taking.

1. A Temporary Interruption of Development Rights Does Not Automatically Create a Temporary Taking.

In *First English*, 482 U.S. 304, this Court made it clear that compensation must be paid for temporary as well as permanent takings of property. The Court, however, left open the question of when a "temporary" denial of use becomes a sufficiently serious interference with property rights as to become an actual taking.

Common sense suggests that an interruption of a day or a week does not amount to a taking. In *First English*, the Court specifically assumed, for purposes of decision, that "the Los Angeles County ordinances denied appellant all use of its property *for a considerable period of years. . . .*" *First English*, 482 U.S. 304, 322, emphasis added. The restrictions had in fact already been in place for over six years. *Id.* at 319. The Court also expressly excluded consideration of "the quite different questions which would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances and the like which are not before us." *Id.* at 321.

In *First English* this Court further stated that "'temporary' takings . . . which deny a landowner all use of

his property, *are not different in kind* from permanent takings . . ." suggesting that analysis of temporary takings requires assessment of the same factors (*i.e.*, character of the governmental regulation, economic impact, and impacts on "reasonable investment backed expectations") as an alleged permanent "taking." *Id.* at 318, emphasis added. Under such analysis, a temporary interruption of development does not automatically result in a temporary taking; the *duration* of challenged restrictions is simply one factor to be considered in assessing their overall impact. The lower courts have interpreted *First English* in precisely this manner. *See, e.g., Ziiber v. Town of Moraga*, 692 F.Supp. 1195, 1206 (N.D. Cal. 1988) [finding that 1½ year development moratorium was not a taking]. Under this analysis, the Court may also consider the character of the challenged regulations, *i.e.*, their legitimacy and purpose, as well as economic impact and disruption (if any) of "reasonable investment backed expectations."

Amici believe that the lower courts have been correct. The temporary prohibition on permanent development of petitioner's property is not *per se* a temporary taking, but must be evaluated on its facts. Duration and purpose of any temporary bar to development are significant in determining whether the government action rises to the level of a taking.

2. The Net Interference with Petitioner's Rights Was Insufficient to Amount to a Taking.

Given the undisputed legitimate purposes of the South Carolina act, the relatively short duration of the development prohibition, and the lack of any demonstrated permanent impact on the economic value of the land or

petitioner's investment backed expectations, the Fifth Amendment does not require the payment of compensation in this situation. A short term moratorium or interruption of development rights, incidental to otherwise valid and reasonable legislation, is not a sufficiently serious interference with property rights that "justice and fairness" require the payment of compensation. *Penn Central*, 438 U.S. 104, 125. Rather such interruptions, even if prompted by overcautious or overinclusive regulation, are among the "incidents of property ownership" which property owners may reasonably be required to bear.

Petitioner Lucas, of course, may feel that the state setback requirement was excessive, and therefore unreasonable, as applied to his particular property. This, however, does alter the basic character of the State's action. The record indicates that Lucas' property is removed, if at all, from the zone subject to storm and erosion damage only by recent, and not necessarily stable, accretions of sand. Even were the setback line deemed overcautious with respect to Lucas' property, it is clear that inclusion of Lucas' property results only from a lack of precision in the State's boundary setting. Such imprecision is unavoidable in any large scale regulatory program. To hold government strictly accountable for such errors of overinclusion would be to effectively stifle such programs, regardless of their overall validity or purpose. In other contexts this Court has recognized that some latitude must be afforded governmental agencies in delimiting precise boundaries. *Berman v. Parker*, 348 U.S. 26, 35-36. There is also no claim that the State's objectives here were illegitimate, that the means chosen for establishing the setback line were arbitrary, nor that the underlying problems addressed by the state legislation are anything short of compelling. As this

Court has stated in another context, government "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Young*, 427 U.S. 50, 71. *Amici* believe that some similar indulgence is warranted where the government attempts to regulate in matters directly affecting public health and safety.

At best, Lucas lives on the margin of an area of unique and special concern, and an area in which special state regulation could be expected, and in fact existed when Lucas purchased his lots. The risk of temporary over-regulation is one which property owners — particularly those in Mr. Lucas' situation — may reasonably be asked to bear as an uncompensated "incident of ownership," so long as the overregulation is not unreasonably continued after the relevant facts are brought to the attention of government.

3. There Is No Indication of Substantial Economic Impacts or Destruction of Lucas' "Reasonable Investment Backed Expectations".

There is no evidence at this time that a 13 month (or two year) ban on development of Lucas' property will result in any permanent loss of value for the property. Indeed, the record suggests that the property has and will continue to appreciate in value. The record is also silent on loss of "reasonable investment backed expectations." There was no threat of confiscation. Lucas purchased one lot for resale, and acknowledged at trial that holding the property for some time would not harm him. South Carolina Supreme Court Transcript of Record, pp.28-29. There is no indication that any delay caused Lucas in building a personal home on his other lot, has worked a substantial

hardship. Given the nature of the restriction at issue — a ban on permanent construction — it is material whether Lucas' plans required him to make immediate use of the property, or whether he was prepared from the outset to permit the property to remain idle for a period of time. At best, Lucas might be entitled to submit evidence on these points on remand. However, it would appear more appropriate to hold that Lucas waived his claim to a temporary taking by failing to present evidence on this point at trial.

Given the actual character of the government regulations at issue, and the lack of demonstrated actual harm to Lucas, *Amici* submit that no taking occurred in this case.

CONCLUSION

For all the foregoing reasons, *Amici* submit that the decision of the South Carolina Supreme Court should be affirmed.

Respectfully submitted,
FREILICH, STONE, LEITNER & CARLISLE
By KATHERINE E. STONE
Counsel of Record for Amici

APPENDIX

APPENDIX OF AMICI

CAROL KORADE, CITY ATTORNEY
CITY OF ALAMEDA
2263 Santa Clara Avenue
Room 314
Alameda, CA 94501

JACK L. WHITE, CITY ATTORNEY
ELEANOR M. EGAN, SENIOR ASSISTANT CITY ATTORNEY
CITY OF ANAHEIM
200 South Anaheim
Boulevard, Suite 356
Anaheim, CA 92805

JUDY SKOUSEN, CITY ATTORNEY
CITY OF ARROYO GRANDE
895 Napa Street, Suite B-6
Post Office Box 834
Morro Bay, CA 93442

ROBIN D. FAISANT, CITY ATTORNEY
CITY OF ATHERTON
1550 El Camino Real
Menlo Park, CA 94025

GARY T. RAGGHIANTI, CITY ATTORNEY
CITY OF BELVEDERE
874 Fourth Street
San Rafael, CA 94901

MANUELA ALBUQUERQUE, CITY ATTORNEY
THOMAS B. BROWN, DEPUTY CITY ATTORNEY
CITY OF BERKELEY
Martin Luther King, Jr.
Civic Center Building
2180 Milvia Street
Berkeley, CA 94704

F. THOMAS CAPOREAL, CITY ATTORNEY
CITY OF CALIMESA
Post Office Box 1190
Calimesa, CA 92320

RICHARD M. MANNING, CITY ATTORNEY
CITY OF CAPITOLA
420 Capitola Avenue
Capitola, CA 95010

RONALD R. BALL, ACTING CITY ATTORNEY
CITY OF CARLSBAD
1200 Carlsbad Village Drive
Carlsbad, CA 92008-1989

JIMMY L. GUTIERREZ, CITY ATTORNEY
CITY OF CHINO
12616 Central Avenue
Chino, CA 91710

BRUCE M. BOOGAARD, CITY ATTORNEY
CITY OF CHULA VISTA
276 Fourth Avenue
Chula Vista, CA 91910

LELAND D. STEPHENSON, CITY ATTORNEY
CITY OF CLOVIS
Post Office Box 1752
Fresno, CA 93717-1752

JIMMY L. GUTIERREZ, CITY ATTORNEY
CITY OF COACHELLA
12616 Central Avenue
Chino, CA 91710

WILLIAM CAMIL, CITY ATTORNEY
CITY OF COMMERCE
2535 Commerce Way
Commerce, CA 90040

THOMAS A. KATHE, CITY ATTORNEY
CITY OF COSTA MESA
77 Fair Drive
Post Office Box 1200
Costa Mesa, CA 92628

ROBERT WELLINGTON, CITY ATTORNEY
CITY OF DEL REY OAKS
857 Cass Street, Suite D
Monterey, CA 93940

DANIEL T. MCCLOSKEY, CITY ATTORNEY
CITY OF DINUBA
Tuttle & McCloskey
351 East Barstow, Suite 106
Freno, CA 93710

ALLEN E. SPRAGUE, CITY ATTORNEY
CITY OF FREMONT
39700 Liberty Street
Fremont, CA 94537

SCOTT H. HOWARD, CITY ATTORNEY
CITY OF GLENDALE
613 East Broadway
Suite 220
Glendale, CA 91206-4394

ROGER PICQUET, CITY ATTORNEY
CITY OF GROVER CITY
Post Office Box 922
San Luis Obispo, CA 93406

GAIL C. HUTTON, CITY ATTORNEY
JOSEPH BARRON, DEPUTY CITY ATTORNEY
CITY OF HUNTINGTON BEACH
2000 Main Street
Post Office Box 2740
Huntington Beach, CA 92647

DAVID J. ERWIN, CITY ATTORNEY
CITY OF INDIO
Best, Best & Krieger
39-700 Bob Hope Drive
Suite 312
Rancho Mirage, CA 92270

LELAND D. STEPHENSON, CITY ATTORNEY
CITY OF KINGSBURG
Post Office Box 1752
Fresno, CA 93717-1752

CHARLES J. WILLIAMS, CITY ATTORNEY
CITY OF LAFAYETTE
2530 Arnold Drive
Suite 360
Martinez, CA 94553

JOHN CALHOUN, CITY ATTORNEY
CITY OF LONG BEACH
333 West Ocean Boulevard
Long Beach, CA 90802

ROBERT K. BOOTH, JR., CITY ATTORNEY
CITY OF LOS ALTOS
One North San Antonio Road
Los Altos, CA 94022

JAMES K. HAHN, CITY ATTORNEY
ANTHONY S. ALPERIN, ASSISTANT CITY ATTORNEY
CITY OF LOS ANGELES
200 North Main Street
City Hall East Room 1800
Los Angeles, CA 90012

ROBERT WELLINGTON, CITY ATTORNEY
CITY OF MARINA
857 Cass Street, Suite D
Monterey, CA 93940

M. DWAIN SMITH, CITY ATTORNEY
CITY OF MCFARLAND
1120 Kensington Street
Delano, CA 93215

LELAND H. JORDAN, CITY ATTORNEY
CITY OF MILL VALLEY
47 Skyview Terrace
San Rafael, CA 94903

WILLIAM B. CONNERS, CITY ATTORNEY
CITY OF MONTEREY
City Hall
Monterey, CA 93940

CHARLES J. WILLIAMS, CITY ATTORNEY
CITY OF MORAGA
2530 Arnold Drive
Suite 360
Martinez, CA 94553

JUDY SKOUSEN, CITY ATTORNEY
CITY OF MORRO BAY
895 Napa Street, Suite B-6
Post Office Box 834
Morro Bay, CA 93442

JOHN L. COOK, CITY ATTORNEY
CITY OF NAPA
955 School Street
Post Office Box 660
Napa, CA 94559-0660

JAYNE WILLIAMS, CITY ATTORNEY
CITY OF OAKLAND
505 Fourteenth Street
Suite 1200
Oakland, CA 94612

DANIEL T. MCCLOSKEY, CITY ATTORNEY
CITY OF ORANGE COVE
TUTTLE & MCCLOSKEY
351 East Barstow
Suite 106
Freno, CA 93710

CHARLES J. WILLIAMS, CITY ATTORNEY
CITY OF ORINDA
2530 Arnold Drive
Suite 360
Martinez, CA 94553

CHARLES LUEDER, CITY ATTORNEY
CITY OF OROVILLE
2060 Third Street
Oroville, CA 95965

GARY L. GILLIG, CITY ATTORNEY
CITY OF OXNARD
300 West Third Street
Oxnard, CA 93030-5790

SUSAN SCHECTMAN, CITY ATTORNEY
CITY OF PACIFICA
170 Santa Maria Avenue
Pacifica, CA 94044

DAVID J. ERWIN, CITY ATTORNEY
CITY OF PALM DESERT
Best, Best & Krieger
39-700 Bob Hope Drive
Suite 312
Rancho Mirage, CA 92270

DAVID J. ALESHIRE, CITY ATTORNEY
CITY OF PALM SPRINGS
Rutan and Tucker
611 Anton Boulevard
Suite 1400
Costa Mesa, CA 92628

GEORGE S. PEYTON, JR., CITY ATTORNEY
CITY OF PIEDMONT
1999 Harrison Street
Oakland, CA 94612

CHARLES J. WILLIAMS, CITY ATTORNEY
CITY OF PITTSBURG
2530 Arnold Drive
Suite 360
Martinez, CA 94553

CAROL B. TANENBAUM,
CITY ATTORNEY
CITY OF PLACENTIA
401 East Chapman
Placentia, CA 92670

DAVE LARSEN, CITY
ATTORNEY
CITY OF PLEASANT HILL
100 Gregory Lane
Pleasant Hill, CA 94523

MICHAEL ROUSH, CITY
ATTORNEY
DENNIS BEOUGHER,
ASSISTANT CITY
ATTORNEY
CITY OF PLEASANTON
123 Main Street
Post Office Box 520
Pleasanton, CA 94566

DON G. KIRCHER, CITY
ATTORNEY
CITY OF PORT HUENEME
BURKE, WILLIAMS &
SORENSON
2310 E. Ponderosa Drive
Suite 1
Camarillo, CA 93010

JEAN LEONARD HARRIS,
CITY ATTORNEY
CITY OF RANCHO MIRAGE
69-825 Highway 111
Rancho Mirage, CA 92270

RANDALL A. HAYS, CITY
ATTORNEY
CITY OF REDDING
760 Parkview Avenue
Redding, CA 96001-3396

JOHN WOODHEAD, CITY
ATTORNEY
CITY OF RIVERSIDE
3900 Main Street
Riverside, CA 92522

MICHAEL F. DEAN, CITY
ATTORNEY
CITY OF ROSEVILLE
311 Vernon Street
Roseville, CA 95678

SHARON SIEDORF
CARDENAS,
CITY ATTORNEY
CITY OF SACRAMENTO
921 Tenth Street
Suite 700
Sacramento, CA 95814-
2717

JOHN W. WITT, CITY
ATTORNEY
C. ALAN SUMPTION, CHIEF
DEPUTY CITY
ATTORNEY
CITY OF SAN DIEGO
525 "B" Street
Suite 2100
San Diego, CA 92101

JOAN GALLO, CITY
ATTORNEY
GEORGE RIOS, ASSISTANT
CITY ATTORNEY
CITY OF SAN JOSE
151 West Mission Street
San Jose, CA 95110

JEFFREY G. JORGENSEN,
CITY ATTORNEY
CITY OF SAN LUIS OBISPO
990 Palm Street
Post Office Box 8100
San Luis Obispo, CA 93403

DANIEL S. HENTSCHKE,
CITY ATTORNEY
CITY OF SAN MARCOS
BROWN, DIVEN &
HENTSCHKE
12770 High Bluff Drive
Suite 240
San Diego, CA 92130

GARY T. RAGGHIANTI,
CITY ATTORNEY
CITY OF SAN RAFAEL
874 Fourth Street
San Rafael, CA 94901

ARTHER R. MONTANDON,
CITY ATTORNEY
CITY OF SANTA MARIA
110 East Cook Street
Santa Maria, CA 93454

ROBERT M. MYERS, CITY
ATTORNEY
JOSEPH LAWRENCE,
ASSISTANT
CITY ATTORNEY
CITY OF SANTA MONICA
1685 Main Street
Room 310
Santa Monica, CA 90401

DAVID J. ALESHIRE, CITY ATTORNEY
CITY OF SIGNAL HILL
RUTAN AND TUCKER
611 Anton Blvd., Ste 1400
Costa Mesa, CA 92628

DANIEL S. HENTSCHKE, CITY ATTORNEY
CITY OF SOLANA BEACH
BROWN, DIVEN & HENTSCHKE
12770 High Bluff Drive
Suite 240
San Diego, CA 92130

DENNIS CRABB, CITY ATTORNEY
CITY OF SOUTH LAKE TAHOE
1052 Tata Lane
South Lake Tahoe, CA 96150-6324

MICHAEL J. O'TOOLE, CITY ATTORNEY
CITY OF SOUTH SAN FRANCISCO
315 Maple Avenue
South San Francisco, CA 94080

M. DWAIN SMITH, CITY ATTORNEY
CITY OF TEHACHAPI
1120 Kensington Street
Delano, CA 93215

PETER BULENS, CITY ATTORNEY
CITY OF VENTURA
501 Poli Street
Ventura, CA 93002

THOMAS HAAS, CITY ATTORNEY
PAUL M. VALLE-RIESTRA, ASSISTANT CITY ATTORNEY
CITY OF WALNUT CREEK
1666 North Main Street
Post Office Box 8039
Walnut Creek, CA 94596

ROBERT JOEHNCK, CITY ATTORNEY
CITY OF WHEATLAND
7430 Morningside Drive
Loomis, CA 95650

DAVID NAWI, COUNTY COUNSEL
SHANE STARK, CHIEF DEPUTY COUNTY COUNSEL
COUNTY OF SANTA BARBARA
105 East Anapamu Street
Santa Barbara, CA 93101

M. NEAL SINGER, TOWN ATTORNEY
TOWN OF APPLE VALLEY
Singer & Silvergleid
3750 University Avenue,
Suite 550
Riverside, CA 92501

LELAND H. JORDAN, TOWN ATTORNEY
TOWN OF FAIRFAX
47 Skyview Terrace
San Rafael, CA 94903

ROBERT JOEHNCK, TOWN ATTORNEY
TOWN OF LOOMIS
7430 Morningside Drive
Loomis, CA 95650

HADDEN ROTH, TOWN ATTORNEY
TOWN OF ROSS
Roth, Curtin & DeCuir
1050 Northgate Drive
Suite 354
San Rafael, CA 94903

HADDEN ROTH, TOWN ATTORNEY
TOWN OF SAN ANSELMO
Roth, Curtin & DeCuir
1050 Northgate Drive
Suite 354
San Rafael, CA 94903

ROBERT B. EWING, TOWN ATTORNEY
TOWN OF TIBURON
1155 Tiburon Boulevard
Tiburon, California 94920

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11852 Santa Monica Boulevard, Suite 3, Los Angeles, California 90025; that on January 31, 1992, I served the within *Brief Of California Cities and Counties As Amici Curiae In Support Ross Of Respondent* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(Express Mail: original and forty copies)

C.C. Harness, III, General Counsel
South Carolina Coastal Council
4130 Faber Place, Suite 300
Charleston, South Carolina 29405
(803) 744-5838
Attorney for Respondent
South Carolina Coastal Council

A. Camden Lewis, Esq.
Lewis, Babcock & Hawkins
1513 Hampton Street
P. O. Box 11208
Columbia, South Carolina 29211
(803) 771-8000
Attorneys for Petitioner
David H. Lucas

Gerald M. Finkel, Esq.
Finkel, Goldberg, Sheftman & Altman
P. O. Box 1799
Columbia, South Carolina 29211

David J. Bederman, Of Counsel
Emory University School of Law
Gambrell Hall
Atlanta, Georgia 30322

Kenneth W. Starr, Solicitor General
Barry M. Hartman, Acting Ass't. Attorney General
Lawrence G. Wallace, Deputy Solicitor General
Roger Clegg, Deputy Ass't. Attorney General
Benedict S. Cohen, Acting Deputy Ass't. Attorney General
Edwin S. Kennedler, Ass't. to the Solicitor General
Peter R. Steenland
James E. Bryson
Martin W. Matzen
Department of Justice
Washington, D. C. 20530
(202) 514-2217
Attorneys for United States

Ronald A. Zumbrun
Edward J. Connor, Jr.
Timothy V. Kassouni
Pacific Legal Foundation
2700 Gateway Oaks Drive
Suite 200
Sacramento, California 95833
(916) 641-8888
Attorneys for Amicus Curiae
Pacific Legal Foundation

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 31, 1992, at Los Angeles, California.

Betty J. Malloy
(Original signed)

LIST OF AMICI CONTINUED

William B. Conners, City Attorney
City of Monterey

Charles J. Williams, City Attorney
City of Moraga

Judy Skousen, City Attorney
City of Morro Bay

John L. Cook, City Attorney
City of Napa

Jayne Williams, City Attorney
City of Oakland

Daniel T. McCloskey, City Attorney
City of Orange Cove

Charles J. Williams, City Attorney
City of Orinda

Charles Lueder, City Attorney
City of Oroville

Gary L. Gillig, City Attorney
City of Oxnard

Susan Schectman, City Attorney
City of Pacifica

David J. Erwin, City Attorney
City of Palm Desert

David J. Aleshire, City Attorney
City of Palm Springs

George S. Peyton, Jr., City Attorney
City of Piedmont

Charles J. Williams, City Attorney
City of Pittsburg

Carol B. Tanenbaum, City Attorney
City of Placentia

Dave Larsen, City Attorney
City of Pleasant Hill

Michael Roush, City Attorney
Dennis Beougher, Assistant City Attorney
City of Pleasanton

Don G. Kircher, City Attorney
City of Port Hueneme

Jean Leonard Harris, City Attorney
City of Rancho Mirage

Randall A. Hays, City Attorney
City of Redding

John Woodhead, City Attorney
City of Riverside

Michael F. Dean, City Attorney
City of Roseville

Sharon Siedorf Cardenas, City Attorney
City of Sacramento

John W. Witt, City Attorney
C. Alan Sumption, Chief Deputy City Attorney
City of San Diego

Joan Gallo, City Attorney
George Rios, Assistant City Attorney
City of San Jose

Jeffrey G. Jorgensen, City Attorney
City of San Luis Obispo

Daniel S. Hentschke, City Attorney
City of San Marcos

Gary T. Ragghianti, City Attorney
City of San Rafael

Arther R. Montandon, City Attorney
City of Santa Maria

Robert M. Meyers, City Attorney
Joseph Lawrence, Assistant City Attorney
City of Santa Monica

(LIST OF AMICI CONTINUED ON BACK OUTSIDE COVER)

LIST OF AMICI CONTINUED

David J. Aleshire, City Attorney
City of Signal Hill

Daniel S. Hentschke,
City Attorney
City of Solana Beach

Dennis Crabb, City Attorney
City of South Lake Tahoe

Michael J. O'Toole, City
Attorney
City of South San Francisco

M. Dwain Smith, City Attorney
City of Tehachapi

Peter Bulens, City Attorney
City of Ventura

Thomas Haas, City Attorney
Paul M. Valle-Riestra, Assistant
City Attorney
City of Walnut Creek

Robert Joehnck, City Attorney
City of Wheatland

David Nawi, County Counsel
Shane Stark, Deputy County Counsel
County of Santa Barbara

M. Neal Singer, Town Attorney
Town of Apple Valley

Leland H. Jordon, Town
Attorney
Town of Fairfax

Robert Joehnck, Town Attorney
Town of Loomis

Hadden Roth, Town Attorney
Town of Ross

Hadden Roth, Town Attorney
Town of San Anselmo

Robert B. Ewing, Town
Attorney
Town of Tiburon

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(27)

No. 91-453

In The

Supreme Court of the United States

October Term, 1991

DAVID H. LUCAS,
Petitioner,

vs.

SOUTH CAROLINA COASTAL COUNCIL,
Respondent.

On Writ of Certiorari To The
Supreme Court Of South Carolina

BRIEF OF AMICI CURIAE BROWARD COUNTY, LEON COUNTY, MANATEE COUNTY AND THE CITY OF NORTH MIAMI BEACH IN SUPPORT OF RESPONDENTS

JOHN J. COPELAN, JR.*
County Attorney for Broward County
MELISSA P. ANDERSON
Assistant County Attorney
Suite 423, Governmental Center
115 South Andrews Avenue
Fort Lauderdale, Florida 33301
Telephone: (305) 357-7600
Telecopier: (305) 357-7641
*Counsel of Record
(Additional Amici Curiae
Counsel Listed in Appendix)

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Rule 37.5, Rules of the Supreme Court of the United States 1

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STATEMENT OF INTEREST OF AMICI CURIAE

The local governments participating in this amici curiae brief have a vital interest in the instant case since they are charged with the protection of the health, safety, and welfare of their citizens. The local governments participating in this amici curiae brief believe that the preservation of sensitive natural resources through local government regulation is essential to the continued health, safety, and welfare of their citizens.

Pursuant to Rule 37.5 of the Rules of the Supreme Court of the

United States, the participants in this amici curiae brief, as political subdivisions of states, do not need the consent of either party to file this brief on behalf of respondent.

SUMMARY OF ARGUMENT

In the instant case, this Court must decide whether the property rights guaranteed by the Fifth Amendment to the United States Constitution include the right to use one's property in such a way as to cause a harm to the public. If this Court agrees with respondent that one's right to property does not include the right to use that property in a way that will harm the public, this Court must then address respondent's assertion, upheld by the South Carolina Supreme Court, that the destruction of a sensitive natural resource such as a coastal area or a wetland causes a public harm.

The Fifth Amendment guarantees that "private property shall not be taken for public use, without just compensation." U.S. Const. amend. V. When a governmental regulation of land affects the value of property so profoundly as to deny all economically viable use of the land, the governmental entity must compensate the property owner. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987). However, the governmental entity is not required to compensate a property owner for prohibiting uses of the land which would cause a public harm. Id. at 491.

In the instant case, the South Carolina Supreme Court upheld a statute which prohibited development in certain coastal areas. *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C. 1991). The court found that the statute prevented a public harm because it prohibited the use of the land in ways which would have resulted in destruction of the coastal ecosystem. Id. at 901. Therefore, the court held that the property owner was not entitled to compensation because the statute did not result in a taking, although the property owner had been denied all economically viable use of the land. Id.

The South Carolina Supreme Court's decision in the instant

case follows an emerging theory in property rights jurisprudence. Just as the right to bear arms or the right to free speech is not an unlimited right, the right to use private property is not absolute. L.C. Becker, *Property Rights: Philisophic Foundations* 2 (1983). The right of landowners to use their property must be weighed against the right of the public to be free from the harm caused by certain uses of sensitive natural resources. D.B. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources*, 12 Harv. Envtl. L. Rev. 311 (1989).

In balancing the right of a property owner against the right of the public to be free from harm, courts must view land as more than property. Courts must look to the role of land as part of a living system. This living system is a community of interdependent parts, typically refered to as an "ecosystem" or the "environment."[1] Individuals are also a part of this living system and anything which affects land eventually affects individuals. Therefore, a property owner should not be allowed to exploit his or her property in such a way as to cause harm to the public.

ARGUMENT

A. The origin of property rights and their relation to land

James Madison, one of the most ardent proponents of the takings clause of the Fifth Amendment before it was ratified, intended the clause to guarantee the inviolability of one's right to possess private property. W.M. Treanor, *The Origins and Original Signifi-*

1. Aldo Leopold explained the living system of which land and humans are a part as a "pyramid." In this pyramid, energy flows from one level to the next, proceeding from the soil on up to large carnivores. Each level of the pyramid is dependent upon every other level for survival. Whenever a level of the pyramid is destroyed or altered, the other levels of the pyramid are affected.

As Leopold noted, each level of the pyramid is always in some way changing. Human induced changes, however, tend to be much more catastrophic than change wrought by nature. Thus, human induced changes are more likely to radically affect and, perhaps, break down the pyramid. A Leopold, *A Sand County Almanac* 214-220 (1987).

cance of the Just Compensation Clause of the Fifth Amendment, 94 Yale L.J. 694, 712 (1986). Madison's intent, however, was that the takings clause apply only to physical takings, as is evidenced by his draft of the clause: "No person shall be obliged . . . to *relinquish* his property, where it may be necessary for public use without just compensation." *Id.* n.22; id. at 711 n.95 (emphasis added). As with the entirety of the Bill of Rights, the takings clause of the Fifth Amendment was passed to protect the rights of the individual from governmental or majoritarian interference.

No right guaranteed by the Constitution, however, is absolute. The determination of the extent to which each right protects an individual's actions, whether it is one of free speech, the right to bear arms, or the right to possess private property, is always a balance between the protection of the individual versus the protection of society. L.C. Becker, *supra* at 2. In the case of property rights, the question is whether the Fifth Amendment guarantees a property owner the right to exploit his or her property in such a manner as to threaten the health, safety, and welfare of individuals.

Only in the last twenty-five years have Americans come to recognize that their health, safety, and welfare are inextricably linked with the health of the environment.[2] Statutory law developed relatively quickly in response to this new cognizance of the individual's role within the environment. The courts, however, particularly in the area of takings jurisprudence and what constitutes a "property right" in relation to the destruction of natural ecosystems, are only now beginning to examine outdated jurisprudence. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987); *McNulty v. Town of Indialantic*, 727 F.Supp. 604 (M.D. Fla. 1989); *Graham v. Estuary Properties*, Inc., 399 So.2d 1374 (Fla. 1981); *Just v. Marinette*

2. As one recent commentator noted, it was during the 1960's, when society wrestled with the devastating effect pesticides had on birds and other mammals, that people came to realize that, as technologically advanced as society might grow, individuals were still a part of the environment and subject to its rules, rather than its master. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources*, 12 Harv. Envtl. L. Rev. 311, 314 (1989).

County, 201 N.W.2d 761 (Wis. 1972).

Takings jurisprudence has traditionally viewed land from only one perspective -- land as "property." The Fifth Amendment to the United States Constitution primarily protects a person's economic interest in land. Hunter, *supra*, at 311. It is only when land is viewed economically, i.e. as a commodity, that it becomes property.[3] The concept of land as property is useful and necessary in a free market economy. However, this narrow perspective is inhibitive and damaging if it is a court's only focus when contemplating the rights guaranteed by the takings clause of the Fifth Amendment. A court must look beyond land's economic value in order to recognize the land's value to the public in the maintenance of society's health, safety, and welfare.

In the instant case, the South Carolina Supreme Court took an enlightened view as to what constituted a property right. The court went beyond the concept of land as solely "property." *Lucas*, 404 S.E.2d at 898. The court analyzed the South Carolina statute from a wider perspective, one which took into account the value of the land as a sensitive natural resource which was part of a living system, as well as the monetary value of the land to the landowner. The court concluded that property rights did not include the right to harm the public by destroying a sensitive natural resource. Id. at 902.

In order to determine what constitutes a property right, this Court will have to balance the right of the individual to use his or her property against the right of others not to be adversely affected by that individual's actions. It is imperative, in making this determination, that this Court also view land as part of a living system, because individuals are a part of this living system. Any action which destroys a part of the living system adversely affects individuals.

3. Although the takings clause also protects a person's basic right to hold private property by stating that property can only be taken for "a public purpose," because states are often given tremendous leeway in the use of police power and what constitutes a "public purpose," the clause's greatest protection of private property rights enures through its guarantee of compensation should the property be "taken."

B. **Takings Analysis**

In deciding whether a regulatory taking has occurred, courts have considered four factors. First, the courts determine whether the nature of the government's interference is an actual invasion of the property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). With one exception, a taking occurs where the governmental regulation results in a physical invasion of the land and, if the regulation is a valid exercise of police power, the landowner must be compensated. Id. If the regulation is not a valid exercise of police power, than the regulation is invalidated and the landowner may seek compensation for the time the regulation affected his or her property. *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). The one exception to this physical invasion rule arises if the regulation prevents a public harm. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

The courts next determine whether the regulation was a valid exercise of police power. *Id.* The validity of the police power requires a two part examination: (1) the regulation must have been enacted for a public purpose; and (2) the regulation cannot be arbitrary or unreasonable. Id.

The third factor the courts consider is the diminution in the value of the land caused by the regulation. *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). Diminution in value is balanced against the amount of public benefit or prevention of public harm gained from the regulation. *Id.* The greater the benefit gained or harm prevented, the less likely a taking has occurred.

The last factor the courts consider is the extent the property owner's distinct investment backed expectations were dashed by the regulation. *Keystone*, 480 U.S. at 485. For instance, if the property owner bought the property in full realization that certain governmental restrictions prohibited development of the property, then the property owner lacks distinct investment backed expectations and the landowner's takings claim, as long as the regulation is a valid exercise of police power, will fail. *Ciampitti v. U.S.*, 22 Cl.Ct. 310 (1991).

The South Carolina legislature in the instant case enacted a statute prohibiting the construction on coastal property beyond a certain setback line. *Lucas*, 404 S.E.2d at 895. The legislature, in the findings and policy section of the statute, stated the statute was enacted in order "to protect life and property by serving as a storm barrier," as well as to preserve the "habitat for numerous species of plants and animals, several of which are threatened or endangered." 404 S.E.2d at 897. The South Carolina Supreme Court ruled that the statute was not a taking because it prevented a public harm by ensuring safety through the preservation of the coastline as a storm barrier, as well as the preservation of the coastline's function as a sensitive natural resource. Id. at 901. The opinion of the South Carolina Supreme Court adopted the emerging theory that regulations preventing public harm by prohibiting the destruction of certain sensitive natural resources are not takings although such regulations preclude all economically viable use of the property.

Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972) was the first instance wherein a court determined that a regulation enacted to prohibit the development of sensitive natural resources, the destruction of which would cause a public harm, was not a taking of the land even though all economically viable use of the land was precluded. Similar to the instant case, the property owner in *Just* challenged a regulation which protected the shore of Wisconsin's lakes against development beyond a certain setback from the water. *Id.* at 764. In upholding the shoreline protection regulations against the property owner's challenge that the government action effected a taking, the Wisconsin Supreme Court stated the "necessity for monetary compensation for loss suffered to an owner by police power restriction arises when restrictions are placed on property in order to create a public benefit rather than to prevent a public harm." *Id.* at 767.

The court in *Just* crystallized a previously ambiguous notion--a person's private property right does not include the right to destroy natural resources if such destruction resulted in public harm. *Id.* at 768. Fifteen years later, in *Keystone*, this Court introduced a similar jurisprudence in regard to the property rights guaranteed by the Fifth Amendment to the United States Constitution. 480 U.S. at 491-92.

Keystone was not decided solely on a prevention of public harm theory. This Court, however, in deciding that the governmental regulation prohibiting coal mining in certain areas was not a taking, stated that the property right guarantee does not include the right to use one's property in such a way as to harm the public. *Id.*

In *Keystone*, this Court referred to Justice Holmes' "reciprocity of advantage" theory set forth in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), and elaborated that, although the value of a landowner's property might diminish somewhat due to governmental restriction, the landowner, as a member of society as a whole, benefitted from the imposition of such restrictions because a public harm was prevented. *Id.* at 491. This Court stressed in *Keystone* that, although the diminution in the value of the property must be looked to in determining whether a taking had occurred, the takings clause was not intended to "require the States or the courts to calculate whether a specific individual has suffered burdens . . . in excess of the benefits received." *Id.* at 491 n.21. Implicit in this Court's analysis in *Keystone*, as well as other takings cases this Court has decided, is that the takings analysis was never meant to be a scientific process. *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211 (1986); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). The takings analysis by necessity weighs each factor in the case, i.e the good promoted or harm prevented, loss in investment backed expectations, and decline in value of the property, to determine what would constitute a fair decision.

Similar to the South Carolina Supreme Court in the instant case, a number of state supreme court decisions and lower federal court decisions have adopted the *Keystone* prevention of public harm theory to protect irreplaceable natural resources. *McNulty v. Town of Indialantic*, 727 F.Supp. 604 (M.D. Fla. 1989); *Graham v. Estuary Properties*, Inc., 399 So.2d 1374 (Fla. 1981). Two recent claims court cases, however, have refused to give the theory credibility. Both *Loveladies Harbor, Inc. v. U.S.*, 21 Cl.Ct. 153 (1990), and *Florida Rock Industries, Inc. v. U.S.*, 21 Cl.Ct. 161 (1990), dismissed the theory that the prevention of the destruction of wetlands did not constitute a taking because such prevention avoided a public harm. In

both cases the claims court found that a taking occurred.

The facts of *Loveladies* and *Florida Rock* are similar to each other. In each case, the landowner brought a challenge against an Army Corps of Engineers ("Corps") denial of a dredge and fill permit. In each case the claims court found there was no economically viable use left in the land after the Corps permit denial. Therefore, both courts held a taking had occurred. The claims court refused in either case to entertain the theory, upheld in *Keystone*, that a regulation prohibiting the development or use of sensitive natural resources, the destruction of which would have caused a public harm, was not a taking.

The court in *Florida Rock* lightly dismissed the Corps' assertion that the Corps was preventing a public harm by prohibiting mining on wetlands contiguous to the Florida Everglades. The court stated that no evidence was introduced at trial showing that pollution would have been caused by the proposed mining activity. Further, the court found that even if evidence as to pollution had been introduced, it was "clear that the nuisance exception to the fifth amendment's requirement of just compensation [was] inappropriate" in that instance. 21 Cl.Ct. at 173. The mining of wetlands, the court stated, did not cause the type of harm that could be defined as a nuisance. *Id.*

It is generally understood that a nuisance is an act which results in injury to a specific person or to the public as a whole. 58 Am. Jur. 2d, *Nuisances* § 1. The court's statement regarding the applicability of the nuisance exception implies the court did not believe the pollution, habitat destruction, and loss of water recharge area which would have been caused by the mining of the wetlands constituted an injury to the health, safety, and welfare of the citizens of South Florida. However, the environmental sciences have proven time and again that certain sensitive natural ecosystems are vital to our continued health, safety, and welfare as humans. *See*, e.g., J.G. Gosselink and W.J. Mitsch, *Wetlands* 393-406 (1986).

The flaw in the claims court's reasoning in holding that the nuisance exception does not apply is further demonstrated in the

court's failure to explain why the public harm exception was applicable in *Keystone* but not applicable in *Florida Rock*. In both *Florida Rock* and *Keystone* the regulations being challenged as a taking concerned mining activities. In *Keystone*, the mining activity would have caused subsidence to the land above, while in *Florida Rock*, the mining activity would have caused pollution, habitat destruction, and loss of water recharge area. The logical extension of the court's decision in *Florida Rock* is that subsidence threatened in *Keystone* was a greater harm than the mining activity in *Florida Rock*. Once again, however, the court failed to explain why the subsidence as a result of the mining in *Keystone* was a greater threat than the pollution and other deleterious effects of mining in wetlands in *Florida Rock*.

Florida Rock and *Loveladies Harbor* failed to recognize the effect of the development and mining of wetlands. Further, *Loveladies* and *Florida Rock* reduced the takings analysis to a number crunching exercise, something that this Court stated the takings analysis was never meant to be. *Keystone*, 480 U.S. at 491-92. *Loveladies* and *Florida Rock* focused almost exclusively on the comparison of fair market value of the land before and after the governmental regulations affected the land. Both cases virtually ignored the purpose that the governmental regulation sought to further, the prevention of destruction of sensitive natural resources which were a vital part of a living system. The very heart of the takings analysis was overlooked in *Florida Rock* and *Loveladies* -- that a court should balance the importance of the governmental purpose in enacting the regulation against the detriment to the landowner.

CONCLUSION

This Court should affirm the South Carolina Supreme Court's decision in the instant case. The South Carolina's Supreme Court's decision adopted an expansive view of "land." In one aspect, land is property. Property owners are afforded certain rights under the Fifth Amendment to the United States Constitution. Land, however, is also a public resource. Although through legal fiction land may be divided into tracts, in reality, land as a whole is a vital part of a living system of which individuals are a part. If a property owner's actions destroy a part of this living system, individuals are harmed. The importance of land as part of a living system and the harm that results from the destruction of certain sensitive natural resources has been empirically proven.

Therefore, the right to private ownership of land must be balanced against the right of individuals not to be harmed by the actions of property owners in utilizing such land. Under the United States Constitution, a person has a right to bear arms, but one does not have the right to use those arms to kill others. Individuals, likewise, have the right to free speech, yet one may not incite violence through the use of speech. In a similar light, a person has the right to private property under the fifth amendment. Yet one does not have the right to use such land in a way that would cause harm to the public.

Respectfully submitted,

JOHN J. COPELAN, JR.*
County Attorney for Broward County
MELISSA P. ANDERSON
Assistant County Attorney
Suite 423, Governmental Center
115 South Andrews Avenue
Fort Lauderdale, Florida 33301
Telephone: (305) 357-7600
Telecopier: (305) 357-7641
*Counsel of Record
(Additional Amici Curiae
Counsel Listed in Appendix)

APPENDIX

ADDITIONAL COUNSEL FOR AMICI CURIAE

HERBERT W.A. THIELE
County Attorney for Leon County
Leon County Courthouse
Tallahassee, FL 32301
Telephone: (904) 487-1008

H. HAMILTON RICE, JR.
County Attorney for Manatee County
MARK P. BARNEBEY
Senior Assistant County Attorney
Post Office Box 1000
Bradenten, FL 34206
Telephone: (813) 745-3750

HOWARD B. LENARD
City Attorney for City of
North Miami Beach
17011 N.E. 19th Avenue
North Miami Beach, FL 33162
Telephone: (305) 947-7581

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BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA IN SUPPORT OF RESPONDENT

DANIEL E. LUNGREN
Attorney General
RODERICK E. WALSTON
Chief Assistant Attorney General
JAN S. STEVENS
Assistant Attorney General
*RICHARD M. FRANK
CRAIG C. THOMPSON
Supervising Deputy Attorneys General
MARIA DANTE BROWN
VIRNA L. SANTOS
Deputy Attorneys General
1515 K Street, Suite 511
Sacramento, Ca. 95814
(916) 445-8178
(*Counsel of Record)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

This case involves the application to petitioner's coastal properties of the South Carolina Beachfront Management Act. That Act initially prohibited petitioner from building permanent, habitable structures on his parcels seaward of a setback line established by respondent. The questions presented are:

1. Whether application of the Act, which was enacted in principal part to respond to documented safety-related hazards, results in a unconstitutional taking of petitioner's property for which compensation is required, where petitioner failed to contest the safety-related basis for the Act, and where his exclusive showing below related to the Act's effect on the value of his property.

2. Whether petitioner's permanent takings claim has been rendered moot as a result of 1990 amendments to the Act which afford petitioner the opportunity to develop his lots, and whether his constitutional claims, including any theory based on an alleged temporary taking of his property, remain ripe in light of the same amendments.

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INTEREST OF AMICUS STATE OF CALIFORNIA

Amicus State of California respectfully files this brief in support of respondent, pursuant to Rule 37.5 of the Rules of the Supreme Court of the United States.

Eighty-four years ago, Justice Oliver Wendell Holmes observed that the public interest in its natural resources is "omnipresent wherever there is a State, and grows more pressing as population grows." (*Hudson County Water Co. v. McCarter*, 209 U.S. 349, 356 (1908).)

That observation is especially compelling with reference to the State of California, its 58 counties and 467 cities. California seeks to accommodate an ever-burgeoning population, and to provide its citizens with the continued health and safety protection which remain the core function of the police power. California must also conserve the same natural resources which have made it a magnet for settlement and development over the last century and a half, and which are essential to serve the very population those resources attract.

California's population of over 30 million people – as compared to approximately 20 million in 1970 – is expected to exceed 36 million residents by the end of the century. (California Department of Finance, *Population estimates for California Cities and Counties* (1991); California Department of Finance, *Projected Total Population of California Counties, 1990-2005* (1991).) Yet it is an ineluctable fact that the state's natural resources remain finite. These competing realities frame the key challenge for California's leaders as they work to maintain both a healthy economy and an adequate quality of life for California's citizens.

The issues presented by this case are of fundamental importance to the State of California. A decision holding that the statute at issue violates applicable constitutional principles would greatly impair the ability of California and its political subdivisions to carry out the most critical and essential police power responsibilities. Adoption of

petitioner's sweeping reformulation of takings jurisprudence – that the sole, relevant criterion is the economic impact of a given regulation on private property – would cripple California's ability to carry out essential government programs upon which her citizens' health and safety quite literally depend.

Several brief examples are illustrative. California's Coastal Act (the state's analogue to the South Carolina Act at issue here) requires that new coastal development approved by state or local governments in California "[m]inimize risks to life and property in areas of high geologic, flood, and fire hazard." (Cal. Pub. Resources Code § 30253(1) (West 1991).) Under petitioner's view of the law, California could not prevent development in a known earthslide area, absent compensation, notwithstanding the potential for disaster for the public and adjoining landowners.

Similarly, in 1971 a major earthquake occurred in Southern California, causing the loss of 58 lives and $1,646,000,000 in property damage. (California Seismic Safety Council, *Loma Prieta's Call to Action* (1991) at p. 11.) In the wake of that natural disaster, California enacted legislation which, *inter alia*, discourages development atop known earthquake faults. (Cal. Public Resources Code § 2621 et seq. (West 1991).) If petitioner's position is embraced by this Court, such limits on construction on obviously hazardous sites could not be enforced absent compensation to a landowner whose property overlies an active earthquake fault.

The State of California is currently defending takings claims in the Lake Tahoe Basin in which hundreds of millions of dollars are sought from two states and a bistate planning agency.[1] That agency, created by the

[1] Tahoe Sierra Preservation Council, et al. v. Tahoe Regional Planning Agency, et al., Case Nos. CIV-R-84-257-ECR (D. Nev.), CIV-S-84-816-EJG (E.D. Cal.).

bistate Tahoe Regional Planning compact, limited development of highly-erodible mountainside areas, based on undisputed scientific evidence that such development would trigger pollution that would significantly impair the water quality of Lake Tahoe itself. (Fink, *Public Land Acquisition for Environmental Protection: Structuring a Program for the Lake Tahoe Basin*, 18 Ecology L. Q. 486, 503-504 (1991).) Despite the fact that Lake Tahoe is a publicly-owned natural resource of worldwide renown (principally due to its exceptional water quality), plaintiffs in the pending lawsuits – like petitioner herein – are effectively claiming a constitutional right to wreak environmental harm on the public unless government pays them not to do so.

Toxic substance control is another context in which petitioner's theory, if adopted, would have untoward consequences. Under California law, state officials can initiate procedures to have property declared as contaminated if hazardous waste is located on or immediately adjacent to the property. That procedure requires notification of affected landowners and a hearing. If successful, the end result is to restrict future uses of the property and to require the execution of restrictive covenants. (See Cal. Health & Safety Code §§ 25220 et seq., 25359.5 (West 1991).) Reversal of the decision below could place the State of California in the intolerable position of either exposing its citizens to risk of exposure to toxic substances by allowing development of the site to proceed or, alternatively, compelling state purchase of the contaminated property.

The implications of petitioner's sweeping contentions are not limited to land use regulation. For example, California has a comprehensive system of food and pesticide regulation designed to insure that the state's agricultural products are safe for the buying public nationwide which consumes California fruits and vegetables. (See, e.g., Cal. Food & Agriculture Code §§ 12641 et seq., 12961 et seq. (West 1991).) The logical extension of petitioner's argument is that this regulatory program – which forms a

cornerstone of California's most important industry – could no longer be enforced absent compensation to the owner of the contaminated food or hazardous pesticide. Such a result is neither rational nor, as discussed below, consistent with existing law.[2]

STATEMENT OF THE CASE

Amicus State of California adopts respondent's statement of the case.

SUMMARY OF ARGUMENT

1. For over a century, this Court has recognized that in instances where government acts to abate a nuisance or to prevent conduct tantamount to a nuisance, no unconstitutional taking transpires even if the value of affected

[2] Furthermore, longstanding principles of state law afford Californians legal recourse in certain instances where state or local officials have failed to provide adequately for their constituents' health and safety. (See, e.g., *Smith v. County of Los Angeles*, 214 Cal.App.3d 266, 262 Cal.Rptr. 754 (1991) (upholding cause of action against county for earthslide damage allegedly caused as result of county's efforts to respond to damage from prior natural disaster); *Potter v. City of Oceanside*, 114 Cal.App.3d 564, 170 Cal.Rptr. 753 (1981).)

Similarly, the dictates of federal law often compel state health and safety-related responses which have the effect of limiting private property rights. E.g., Federal Coastal Zone Management Act, 16 U.S.C. §§ 1452(2)(B), 1458(a).

Demands on California's already-strained fiscal resources will be further exacerbated if those who are allowed to build in harm's way are thereafter free to seek financial recourse from the government once disaster strikes. Adoption of petitioner's extreme theory would hamstring the State of California's ability reasonably to prevent health and safety hazards and to comply with federal mandates, while leaving the state exposed under state law to liability accruing from the inevitable lawsuits filed by California citizens against the government that failed to protect them from those hazards.

private property is substantially diminished or eliminated. This principle, which also has strong antecedents in venerable common law doctrine, makes possible the most fundamental role of government: protecting its citizens from hazards to public health and safety. It also is predicated upon the longstanding principle that one has no right – constitutional or otherwise – to make use of his or her property in such a way as to injure other property owners or the public.

It is equally settled, however, that the nuisance exception to the Takings Clause is not coextensive with the police power. In determining whether a given regulation properly falls within the nuisance exception to the Takings Clause, the proper judicial inquiry is whether a primary purpose of the measure is to protect public health or safety. Moreover, the government's health and safety objectives of such a program must be objectively verifiable by a reviewing court for the nuisance exception to apply.

2. The record below reveals that petitioner assiduously avoided any challenge to the health and safety-based underpinnings of the South Carolina Beachfront Management Act. Instead, petitioner focused his takings challenge exclusively on one facet of that Act's impact on his property: the extent to which the Act diminished the economic value of his lots. Only before *this* Court has petitioner altered his litigation strategy and broadened his constitutional challenge. Here he argues – for the first time – that the Act's setback requirements fail because they are predicated on police power objectives other than those found both extant and compelling by the South Carolina Supreme Court.

Petitioner's stratagem must fail for two reasons: first, he has waived his right to challenge the justification for the Act's setback requirements and conceded the issue below. Second, even if this Court were to relieve petitioner of that concession, the proper disposition under established principles of federalism and comity is for the Court to remand the case to the South Carolina courts for further proceedings on that issue.

3. If the Court determines that the nuisance exception is for some reason inapplicable to the present case,

petitioner's takings claim is properly resolved by reference to the multi-faceted standard articulated in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). Petitioner errs in contending that his takings claim should be resolved solely by reference to the South Carolina Act's economic impact on his property. The character of the governmental action and petitioner's reasonable investment-backed expectations are also essential factors in the takings equation. Since those factors have not been fully developed on the present record, the case should be remanded to the lower courts if this Court finds the *Penn Central* standard applicable here.

4. The procedural posture of this case deprives it of the justiciability required for review by the Court. First, petitioner's claim of a permanent taking resulting from the 1988 Act is moot because subsequent amendments have substantially altered the Act's impact on petitioner's property. Those amendments plainly allow petitioner to submit a development application for review. Second, any takings claim based on the current law is not ripe, because petitioner has never submitted such an application. Finally, petitioner may not now raise potential issues concerning a "temporary taking" because, pursuant to the parties' stipulation below, that claim has never been presented to the South Carolina courts.

ARGUMENT

I.

GOVERNMENT REGULATION DESIGNED TO PREVENT OR LIMIT PRIVATE ACTIVITIES THAT THREATEN PUBLIC HEALTH OR SAFETY DO NOT CONSTITUTE COMPENSABLE TAKINGS, REGARDLESS OF THEIR ECONOMIC IMPACT ON AFFECTED PROPERTY.

A. The "Nuisance Exception" to Takings Jurisprudence is Both Longstanding and Well-Established.

The Takings Clause of the Fifth Amendment provides that "private property [shall not] be taken for public use

without just compensation." The Takings Clause has been made applicable to state and local governments through the due process conduit of the Fourteenth Amendment. (*Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 241 (1897).)

Constitutional scholars have established that the drafters of the Takings Clause "intended the clause to have narrow legal consequences: It was to apply only to the federal government and only to physical takings." (Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694, 708 (1985); Hagman and Misczynski, *Windfalls for Wipeouts: Land Value Capture and Compensation*, (1978), pp. 256, 272.) Nevertheless, in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) and related cases, this Court identified the doctrine of "regulatory takings." Speaking for the Court in *Pennsylvania Coal*, Justice Holmes opined that regulation which "goes too far" can result in a taking of private property requiring compensation, notwithstanding the fact that title to and use of the regulated property remains with its private owner. (260 U.S. at 393; see also, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315-317 (1987).)

1. The Takings Clause and the case law which has developed under it reflect the inevitable tension between the right of the individual citizen to utilize private property and the unquestioned need for government to exercise its police power to protect the general public. (*Armstrong v. United States*, 364 U.S. 40, 49 (1960).) Perhaps in light of this ever-present conflict, the Court has repeatedly professed itself unable to develop bright line rules that will always provide clear guidance as to when a regulatory taking transpires. (See, e.g., *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978); *Pennsylvania Coal, supra*, 260 U.S. 393, 416 ("this is a question of degree – and therefore cannot be disposed of by general propositions").) Particularly in close cases, a balancing of interests and an "ad hoc factual inquiry" are required under applicable constitutional principles.

(*Penn Central, supra,* 438 U.S. at 124; *Kaiser Aetna v. United States,* 444 U.S. 164, 175 (1979).)

Nevertheless, this Court has consistently recognized that in those instances where government acts to abate a nuisance or to prevent private action "tantamount to public nuisances," no unconstitutional taking transpires even if the value of affected private property is substantially diminished or eliminated. (*Keystone Bituminous Coal Assn. v. DeBenedictis,* 480 U.S. 470, 491-492 (1987).)[3]

In *Keystone,* decided a mere five years ago, the Court reaffirmed over a century of jurisprudence, confirming the special deference accorded police power measures which eliminate or prevent tangible threats to the public's health and safety. Significantly, the dissent in *Keystone* did not take issue with the proposition – reaffirmed and applied by the majority – that certain health and safety-related regulatory programs are valid under the Takings Clause notwithstanding their economic impact: "[W]e have recognized that a taking does not occur where the government exercises its unquestioned authority to prevent a property owner from using his property to injure others without having to compensate the value of the forbidden use." (480 U.S. at 511 (Rehnquist, C.J., dissenting); see also, *First English, supra,* 482 U.S. 304, 313 (remanding to state court issue of "whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as part of the State's authority to enact safety regulations.").)

Keystone is no aberration. That case, rather, reflects the Court's longstanding adherence to a fundamental principle of takings law: that the Fifth Amendment does not confer on private parties a constitutional right to use

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[3] The exception finds its source in the origins of nuisance law, which is concerned with the prevention of harm to others. This cannot reasonably be equated with "public *use*" of private property for which compensation is required under the Takings Clause. See discussion, *infra.*

their property in such a way as to injure their neighbors or the public. It has long been a part of this nation's jurisprudence that no one is entitled to use their property so as to cause harm to others:

> "[The police power] rests upon the fundamental principle that every one shall so use his own [property] as not to wrong and injure another. To regulate and abate nuisances is one of its ordinary functions." (*Northwestern Fertilizing Co. v. Hyde Park,* 97 U.S. 659, 667 (1879).)

As this Court observed early in this century:

> "Under such circumstances the State, in the exercise of the police power, may legitimately extend the application of the principle that underlies the maxim *sic utere tuo ut alienum non loedas* [use your own property in such manner as not to injure that of another], so far as may be requisite for protection of the public . . . [T]he enforcement of uncompensated obedience to a regulation established under this power for the public health or safety is not an unconstitutional taking of property without compensation . . . " (*Atlantic Coast Line v. Goldsboro,* 232 U.S. 548, 558-559 (1914).)

Most commentators (and, indeed, the Court itself) cite the Supreme Court's 1887 decision in *Mugler v. Kansas,* 123 U.S. 623 (1887) as the first case to explicitly recognize the "nuisance exception" to the Takings Clause. (See *Penn Central, supra,* 438 U.S. at 144-145 (Rehnquist, C.J., dissenting.[4]) In *Mugler,* the Court upheld against constitutional challenge the state's power to close a profitable brewery. Justice Harlan, speaking for a unanimous Court in *Mugler* on this point, observed:

> "[A]ll property in this country is held under the implied obligation that the owner's use of it

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[4] But see *Northwestern Fertilizing Co. v. Hyde Park, supra,* cited and relied upon in *Mugler* (123 U.S. at 666-667); see also, *Patterson v. Kentucky,* 97 U.S. 501 (1878); and state court cases cited *infra.*

> shall not be injurious to the community . . . " A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit." (123 U.S. at 668-669.)

Over the following 100 years, the Court has applied the nuisance exception to reject a variety of Takings Clause challenges. In each case the Court found that the health and safety-based objectives of the regulatory programs being challenged insulated them from constitutional attack. (See, e.g., *Welch v. Swasey*, 214 U.S. 91 (1909) (municipal height limitation); *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531 (1914) (miner safety regulation); *Reinman v. Little Rock*, 237 U.S. 171 (1915) (urban ban on livery stables); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (dismissing takings challenge to city ordinance which required closure of profitable brickyard, thereby reducing economic value of property by 92.5 per cent); *Gorieb v. Fox*, 274 U.S. 603 (1927) (municipal setback regulations); *Miller v. Schoene*, 276 U.S. 272 (1928) (finding no taking where state had required landowner to cut down infected trees in order to prevent disease's spread to other properties. "where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.").)

The contention – advanced by petitioner and others – that the Court's decision in *Pennsylvania Coal* somehow overruled these precedents *sub silentio* is simply nonsensical in light of the Court's subsequent cases. For example, Justice Holmes, who authored the *Pennsylvania Coal* decision, also joined in the opinions in *Gorieb* and *Schoene*, discussed above.[5] Even more compelling is the fact that

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[5] That Justice Holmes did not view the Takings Clause as an inflexible bar to all health and safety-based regulation is

(Continued on following page)

this Court has regularly reaffirmed and applied the nuisance exception in a number of modern Takings Clause cases. (See *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-596 (1962); *Penn Central, supra*, 438 U.S. 104, 125; *Keystone, supra*.)

2. The nuisance exception to the Takings Clause finds its antecedents in venerable common law doctrine. The principles announced in *Mugler, et al.*, are predicated to a substantial degree on Anglo-American principles of tort and property law. (See. e.g., Prosser, *Law of Torts*, (4th ed. 1971), § 57; *Restatement (Second) of Torts* §§ 364-371.) This is particularly relevant in light of the fact that property rights are themselves fundamentally a creature of state, rather than federal, law. (*Ruckleshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984); *Preseault v. Interstate Commerce Commission*, 494 U.S. 1, 20 (1990) (O'Connor, J., concurring).)

3. Not surprisingly, the principle that no taking exists when government acts to prevent threats to public health and safety – irrespective of economic impact on private parties – is firmly embedded in state law precedents as well. Many such state decisions, in fact, predate and presage *Mugler*. In *Commonwealth v. Alger*, 61 Mass. 53 (1851), the Massachusetts court upheld an ordinance which prohibited construction of wharves beyond a prescribed harbor line, on the ground that such structures

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underscored by a number of his other opinions. See, e.g., *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237-238 (1907) ("the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain."); *Hudson Water Co. v. McCarter*, 209 U.S. 349, 355 (1908) ("It is a fair and reasonable demand on the part of a sovereign that the air over its territory not be polluted . . . that the forests on its mountains . . . shall not be further destroyed or threatened by the acts of persons beyond its control, that the crops and orchards on its hills should not be endangered from the same source.")

constituted a public nuisance. (See also, *Stuyvesant v. Mayor of New York*, 7 Cow. 585 (1827) (upholding on public health grounds ordinance banning burials in certain portions of New York City); *People v. Hawley*, 3 Mich. 330 (1854).)

Twentieth century state court precedents are similarly in accord. For example, in *Consolidated Rock products v. City of Los Angeles*, 57 Cal.2d 515, 20 Cal.Rptr. 638, 370 P.2d 342, *appeal dismissed*, 371 U.S. 36 (1962), the California Supreme Court found that a rock and gravel quarry within city limits was properly banned on public health and pollution hazard grounds, notwithstanding the absence of an alternative economic use. Also noteworthy is *Milardo v. Coastal Resources Management Council of Rhode Island*, 434 A.2d 266, 269-270 (R.I. 1981), in which the Rhode Island Supreme Court rejected a developer's challenge to an administrative denial of a sewer system permit, where evidence showed the effect would be to pollute an adjoining marsh:

> "In essence, plaintiff is asserting a right not only to use his property but also to discharge waste into the surrounding area. This is a 'property right' that this court [has] refused to recognize . . . We believe that this denial was an exercise of the police power for protection of the public health and safety."

(See also, *Nassr v. Commonwealth*, 394 Mass. 767, 477 N.E.2d 987 (1985) (hazardous waste site); *Eno v. Burlington*, 125 Vt. 8, 209 A.2d 499 (1965) (unsafe structure).)

4. Accordingly, it is far too late in the history of takings law to assert – as petitioner unabashedly does – that the nuisance exception to the Takings Clause is nonexistent. (Petitioner's Brief at pp. 11-14.) As the Solicitor General correctly observes:

> "The roots of the [nuisance exception to the Takings Clause] extend deep into the Court's precedents and historical definitions of private property rights, and into the correlative power

> of the government to abate nuisances and protect public health and safety from serious harm." (Brief of Solicitor General at p. 15.)

This Court recently confirmed this very principle in *Keystone, supra*. There the Court explicitly rejected the identical argument advanced by petitioner in the present case: that *Pennsylvania Coal* had somehow implicitly overruled *Mugler* and its progeny. (480 U.S. 470, 490.) Citing *Mugler*, the Court in *Keystone* held:

> "Long ago it was recognized that 'all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community,' . . . and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it." (480 U.S. at 491-492.)[6]

In summary, longstanding Supreme Court jurisprudence confirms the nuisance exception to the Takings Clause. Under that exception, the state is not required to pay compensation to a private property owner if the regulation at issue is imposed in order to prevent or address a threat to public health or safety. And this is true

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[6] Perhaps aware of the frailty of his argument-in-chief, petitioner makes the equally remarkable contention that although the nuisance exception may in fact be applicable with respect to *facial* takings challenges, it has no relevance to *as-applied* takings claims such as that he posits in the present litigation. See Petitioner's Brief at 16-19.

The purported distinction is both spurious and lacking in any precedential support. It makes no sense to argue that while government may enact a law banning tainted food from the marketplace, it cannot enforce the law without paying for the contaminated food. Not surprisingly, petitioner cites no support for this startling proposition. To the contrary, many of the cases in which the courts have invoked the nuisance exception involve as-applied takings claims. See, e.g., *Goldblatt, supra; Miller v. Schoene, supra.*

even if the impact of the regulation is to substantially diminish or eliminate the value of affected private property. Accordingly, petitioner's importunings to the Court to ignore *stare decisis* and reverse over a century of settled precedent in this area should be squarely rejected.

B. The Nuisance Exception is Properly Limited to Those Police Power Measures Which Are Based in Principal Part on Objectively-Verifiable Health and Safety Concerns.

To conclude that the nuisance exception to the Takings Clause remains fully viable does not, however, end the constitutional inquiry. It remains to be determined whether a particular regulatory measure properly fits within that limited exception to the Fifth Amendment's compensation requirement.[7]

1. It is by now axiomatic that the nuisance exception is not co-extensive with the state's police power. (*Keystone, supra,* 480 U.S. at 491 n.20; *Penn Central, supra,* 438 U.S. at 145 (Rehnquist, J., dissenting).) Accordingly, not all regulatory programs are of a nature which fall within the nuisance exception.

The proper inquiry, we submit, is whether a primary purpose of a particular government regulation is to protect public health or safety, and whether the regulation is reasonably related to that purpose. The health and safety risks to be addressed by such a program must be objectively verifiable in order for the program to be encompassed within the nuisance exception.

Conversely, if the principal purpose of a government regulation is to promote non-health and safety concerns –

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[7] As is explained *infra,* petitioner has effectively waived his right to pursue this point before the Court. This is because he conceded the compelling objectives of the South Carolina Act in the trial court, opting instead to focus his takings challenge exclusively on the economic impact to his property of the Act. See discussion at pp. 20-22, *infra.*

such as economic or aesthetic interests – that regulation is beyond the scope of the nuisance exception. Such a regulatory program – assuming it does not effect a physical occupation of private property (*cf. Kaiser Aetna v. United States, supra,* 444 U.S. 164, 180) – is instead properly analyzed under the multifaceted criteria identified in *Penn Central, supra,* 438 U.S. at 124.[8]

This distinction becomes more apparent by comparing certain examples. For example, a state statute which prohibits the manufacture of hazardous weapons materials adjacent to schools would come within the nuisance exception. Similarly, a regulation authorizing government seizure and destruction of seriously-diseased livestock passes constitutional muster under *Keystone* and related precedents. Government certainly has the ability, consistent with constitutional rights of private property, to ban activities which so directly threaten the public welfare.

Properly protective or preventative measures can be contrasted against those government programs which have as their objective the redistribution of economic resources, the conferring of public benefits, or promotion of aesthetic concerns. Examples of such regulatory programs which this Court has recently reviewed include rent control (*Pennell v. City of San Jose,* 485 U.S. 1 (1988); *Fisher v. City of Berkeley,* 475 U.S. 260 (1986); *Yee v. City of Escondido,* No. 90-1947); certain redistributions of economic wealth (*Bowen v. Gilliard,* 483 U.S. 587 (1987) (welfare benefits); *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229 (1984) (land reform)); and billboard control (*Metromedia, Inc. v. City of San Diego,* 453 U.S. 490 (1981)). It is beyond reasonable dispute that each such program falls within the constitutional scope of the police power, and this Court has so held. However, we do not believe that any of these public purposes can reasonably be equated with the nuisance exception embraced in *Mugler, Keystone,* et al. Rather, in reviewing each such non-health

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[8] See discussion at pp. 23-26, *infra.*

and safety-related measure, takings jurisprudence requires application of the several factors identified in *Penn Central*: not only the character of the governmental action, but also the economic impact of the regulation and the extent to which the regulation has interfered with the owner's reasonable investment-backed expectations. (438 U.S. at 124.) In such a situation, an admittedly valid exercise of the police power may nevertheless result in a taking; consequently, compensation could be required on the facts of a given case. (See, e.g., *Hodel v. Irving*, 481 U.S. 704 (1987).)

The nuisance exception, on the other hand, encompasses a far narrower universe of government purposes and programs. Health and safety concerns to which that exception is applicable under the *Mugler/Keystone* standard include: prevention of water pollution (*Goldblatt*); dangerous subsidence (*Keystone*); air pollution (*Northwestern Laundry v. Des Moines*, 239 U.S. 486 (1916); floodplain zoning (*Adolph v. Federal Emergency Management Agency of the United States*, 854 F.2d 732 (5th Cir. 1988); *Turner v. County of Del Norte*, 24 Cal.App.3d 311, 101 Cal.Rptr. 93 (1972)); and erosion control (*Esposito v. South Carolina Coastal Council*, 939 F.2d 165 (4th Cir. 1991), *petition for cert. pending; McNulty v. Town of Indialantic*, 727 F.Supp. 604 (M.D.Fla. 1989)).

2. Of course, there will be instances in which the judiciary is confronted with takings challenges to regulatory programs whose objectives are unclear, multifaceted or both. We believe several principles are useful in examining such a case.

First, the courts should look to the objectives cited by the legislative body responsible for promulgating the program under review. These objectives are to be gleaned from the legislative history or, preferably, from the legislative findings adopted as part of the measure itself.

Second, substantial deference must be given to those legislative findings and judgments, under settled separation of powers principles. That such deference is required in takings cases is well-established. (*Euclid v. Ambler*

Realty Co., 272 U.S. 365, 388-389 (1926); *Keystone, supra*, 480 U.S. 470, 511 n.3 (Rehnquist, C.J., dissenting).) Nevertheless, judicial deference is not without limits, and the question of whether a measure reasonably relates to a legitimate health and safety objective ultimately rests with the judiciary, not the legislature. (See, e.g., *Keystone, supra*, 480 U.S. 470, 487 n.16: "*Pennsylvania Coal* instructs courts to examine the operative provisions of a statute, not just its stated purpose.") This Court has recently indicated that the judiciary is obliged to examine closely the fit between the challenged regulation and the claimed state objective. (*Nollan v. California Coastal Commission*, 483 U.S. 825, 834 (1987); see also, *Penn Central*, 438 U.S. 104, 127.) Such a "hard look" is similarly appropriate in reviewing government's claim that a given regulation is predicated upon objectively-verifiable health and safety concerns.

Third, there will be instances, like the present case, in which a regulation is justified on *both* health and safety concerns and unrelated, albeit legitimate, purposes. In such instances, we believe the proper course is first to undertake the above analysis of the existence and legitimacy of health and safety objectives. For if a regulation *does* advance documented, legitimate health and safety-based concerns, the *Mugler/Keystone* standard is satisfied. This is true even if aesthetic, economic or similar objectives are simultaneously furthered by the measure. Stated another way, the mere fact that a regulation serves collateral as well as core public purposes should not diminish the standing of such a regulation for purposes of judicial review under the Takings Clause.[9]

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[9] For example, the principal purpose of a land use ordinance preventing development on steep mountainsides with a history of earthslides is to prevent damage to the community below the mountain. Such a measure should qualify under the nuisance exception to the Takings Clause, despite the fact that it arguably may also foster the aesthetic and open space objectives of the community.

Fourth, the question of whether a given activity is akin to a nuisance for purposes of the *Mugler/Keystone* exception cannot be viewed in the abstract. As Justice Brennan observed for the Court in *Penn Central*, this is part of the "ad hoc, factual inquiry" essential in takings cases. (438 U.S. at 124.) Moreover, what qualifies as a nuisance-type activity often depends on where that activity is situated. As Justice Sutherland observed in *Euclid v. Ambler Realty Co., supra*, 272 U.S. 365, 368, "a nuisance may be merely a right thing in the wrong place, like a pig in a parlor instead of the barnyard." Accordingly, prohibiting a chemical plant in a residential neighborhood may well fall within the scope of the nuisance exception, while excluding such an operation from an industrial area might not. Similarly, a ban on residential home construction in an earthquake or erosion-prone area would fit within the *Mugler/Keystone* standard, whereas residential development in non-hazardous areas would not.

Finally, it is well-established that although the nuisance exception derives from the common law, the applicability of the exception need not be determined strictly according to common law standards. Historically, property may have been used in ways which scientific discoveries or technological advances now clearly demonstrate are harmful to the public. (Asbestos in construction activities is one prominent example.) This Court has recognized this venerable principle on several occasions. (See, e.g., *Missouri v. Illinois*, 200 U.S. 496, 522 (1906), superceded by statute as stated in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987); *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915); *Miller v. Schoene, supra*, 276 U.S. 272, 280.) The principle is rooted in the necessary flexibility of the police power:

> "A vested interest cannot be asserted against [the police power] because of conditions once obtaining . . . To so hold would preclude development and fix a city forever in its primitive conditions." (*Hadacheck, supra*, 293 U.S. at 410.)

Justice Black made a similar observation in the context of a takings challenge:

> "[T]he solution of the problems precipitated by these technological advances and new ways of living cannot come about through the application of rigid constitutional restraints formulated and enforced by the courts." (*United States v. Causby*, 328 U.S. 256, 274 (1946) (Black, J., dissenting.).)

This does not mean, of course, that the nuisance exception to the Takings Clause will necessarily expand in scope as scientific advances demonstrate new threats to public health and safety. While modern technology will doubtless continue to reveal such dangers from previously-undetected sources, it is equally true that the passage of time and those same technological advances serve to eliminate other types of once-feared public health and safety concerns. For example, modern zoning and open space ordinances – perhaps the most common form of aesthetic-based regulation, which would for the most part seem to be beyond the scope of the nuisance exception – find their historical roots in measures designed to forestall far more tangible threats such as "fire, panic, and other dangers . . . " (Sax, *Some Thoughts on the Decline of Private Property*, 58 Wash. L.R. 481, 490-491 (1983).) While municipal height limitations are now generally predicated primarily on aesthetic grounds (*Haas v. City and County of San Francisco*, 605 F.2d 1117 (9th Cir. 1979)), this Court upheld them early in this century on the then-compelling ground that excessively-tall buildings in an urban setting constituted a special fire hazard. (*Welch v. Swasey*, 214 U.S. 91, 107-108 (1909).)

3. Accordingly, the nature of societal problems that give rise to the nuisance exception will continue to evolve; this evolution is intrinsic to the necessary elasticity of the police power itself. However, the nuisance exception and the police power are not and never have been coterminous. Not every exercise of the latter falls within the nuisance exception. The ultimate question in

each case is whether an underlying, primary purpose of a particular regulatory program is to prevent uses of property that are harmful to the public health and safety.

II.

THIS COURT SHOULD NOT BE REQUIRED TO DETERMINE WHETHER APPLICATION OF THE SOUTH CAROLINA STATUTE TO PETITIONER'S PROPERTY QUALIFIES UNDER THE NUISANCE EXCEPTION; IF DEFERENCE TO THE STATE COURT'S FINDING CANNOT BE MADE, THE PROPER DISPOSITION IS TO REMAND FOR FURTHER PROCEEDINGS.

A. Petitioner Failed to Address the Heath and Safety-Based Justification for the South Carolina Beachfront Management Act in the State Courts; He Has Therefore Waived the Ability to Dispute the Issue Before This Court.

Both at trial and on appeal to the South Carolina Supreme Court, petitioner embarked upon a single-minded litigation strategy: he argued the unconstitutionality of the Beachfront Management Act, as applied to his property, based exclusively on the adverse economic impact of the Act upon that property. (Tr. 19-80, 94; Resp. Br. S.C. Sup. Ct. at p. 2.) Petitioner assiduously avoided raising any issue concerning the character of the governmental action or the extent to which they interfered with petitioner's reasonable investment-backed expectations. Indeed, he repeatedly conceded the validity of the public purposes relied upon by the South Carolina Legislature in enacting the statute and by respondent in enforcing it. (*Ibid.*)

Having embarked upon such an extreme and unprecedented theory, petitioner cannot now be heard to complain that the South Carolina Supreme Court misread the goals and objectives of the Act. Petitioner has conceded that respondent was acting, within its police power, to prevent actions akin to a public nuisance. This is the position respondent adopted below, and it was properly

accepted by the South Carolina Supreme Court. (404 S.E.2d 895, 898.) It is therefore especially unseemly for petitioner to fault the South Carolina Supreme Court for the latter's finding that the Act's setback requirement falls within the nuisance exception to the Takings Clause. (E.g., Petitioner's Brief at pp. 35, 44.) Having failed below to rebut or even address respondent's argument to the contrary,[10] petitioner cannot legitimately shift his litigation strategy at this juncture and fault the lower court for reaching a conclusion which petitioner steadfastly refused to address.

Nor is petitioner accurate in accusing the lower court of having "converted a complex [takings] inquiry into a bright-line test." (*Id.* at p. 9.) That is in fact precisely what petitioner sought to do – albeit unsuccessfully – in arguing below the radical and unsupported view that a regulation's economic impact on property is the sole appropriate criterion in a takings claim.

This Court has repeatedly admonished that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." (*Street v. New York*, 394 U.S. 576, 582 (1969); Supreme Court Rule 21.1(h).) It is essential that a federal question be raised, presented and pursued in a timely and proper manner at the appropriate stage of the state court proceedings if it is to be preserved for Supreme Court review. (*Godchaux Co. v. Estopinal*, 251 U.S. 179, 181 (1919); see also Stern, Gressman & Shapiro, *Supreme Court Practice* (6th ed. 1986) at pp. 149-151.)

This case demonstrates the wisdom of that rule. Petitioner utterly failed to challenge the nuisance-type underpinnings of the Act's setback requirements in the state

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[10] Indeed, petitioner *objected* on relevancy grounds when respondent's counsel attempted to introduce evidence at trial as to the public purposes underlying the Act's setback requirements. See Tr. 94-97.

courts. He is therefore barred from doing so at this juncture, and the decision below should be affirmed on that basis.

B. If the Court Believes There is an Inadequate Record Regarding the Character of the South Carolina Statute or Related Points, the Proper Disposition is to Remand the Case to the State Courts for Further Proceedings.

If this Court nonetheless believes that the South Carolina Supreme Court's examination of the 1988 Act was somehow deficient, the proper disposition is to remand the case to the South Carolina Supreme Court for further proceedings.[11] Such a remand would permit the state court to determine in the first instance whether the nuisance exception applies in the present case.[12]

This result is fully consonant with traditional principles of federalism. The Court has regularly observed that state courts should appropriately construe and examine state legislation and regulation in the first instance. (E.g., *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Lehman Brothers v. Schein*, 416 U.S. 386, 390-391 (1974).)

A remand is also consistent with the Court's oft-cited concern for judicial economy and efficiency. Specifically, lower courts should determine factual issues. This is not an activity which the appellate courts – and especially this Court – have the time and ability to perform. (See, e.g., *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, supra*, 482 U.S. 307, 313-314, in which the Court remanded the case to the state courts for

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[11] To the extent further development of the factual record is deemed to be required, the South Carolina Supreme Court could in turn remand the case to the trial court for additional evidentiary proceedings.

[12] A remand would also seem appropriate in order to permit a review of the extent to which the 1990 amendments to the Act affect petitioner's takings claim. See discussion at pp. 27-30, *infra*.

a determination as to whether the ordinance at issue was justified under the nuisance exception to the Takings Clause; see generally, Wright, *Law of Federal Courts* (West 4th ed. 1983), § 96.)

It would be singularly inappropriate for this Court to examine the extent to which the Act does or does not fall within the *Mugler/Keystone* nuisance exception in the first instance, before the South Carolina courts have had an opportunity to review their own statute for that purpose. Accordingly, if this Court believes the issue of the Act's efficacy has properly been raised and preserved, the case should be remanded for further state court proceedings on that issue.

III.

IF THE COURT SHOULD FIND THE NUISANCE EXCEPTION INAPPLICABLE TO THE PRESENT CASE, THE *PENN CENTRAL* "BALANCING OF INTERESTS" TEST WOULD APPLY

1. This Court has long and consistently held that the question of whether government is required to pay compensation for restrictions imposed on private property must be resolved by a case-by-case balancing of public and private interests. *See, e.g., Goldblatt v. Town of Hempstead*, 369 U.S. 590, 595 (1962). In the case of preventing or abating nuisances, the state interests are, as explained above, necessarily superior to those of the property owner. In other cases, the public needs and interests served by the restrictions must be balanced against the burdens imposed on the property owner as defined by his or her reasonable investment-backed expectations and the economic impact caused by the regulation.

Petitioner argues, however, for a more simplistic test. He contends the government must reimburse a property owner for any diminution in the property's value due to

regulation, regardless of the interests served and regardless of the owner's reasonable investment-backed expectations. Such a rule would quite literally destroy the ability of government to govern effectively. As the Court noted in *Pennsylvania Coal, supra,* 260 U.S. at 413:

> "[G]overnment hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power."

This Court, over many years, has fashioned a workable and practical test by which property owners, legislators and the public can predict, and the judiciary can decide, whether government legislation has imposed such a severe restriction on the use of property that the people must pay. The Court should not accept petitioner's request that it destroy that craftsmanship.

The classic statement of the balancing test is found in *Penn Central Transportation Company v. City of New York, supra*:

> "[W]e have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.' . . .
>
> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. . . . So, too, is the character of the governmental action."

Id. at 124 (citations omitted).

The Court has alternately stated the applicable standard in *Agins v. City of Tiburon, supra,* 447 U.S. at 260 as whether the regulation "does not substantially advance

legitimate state interests [citation] or denies an owner economically viable use of his land . . . "[13]

Many other cases decided by this Court have applied this basic test to takings claims. See, e.g., *Andrus v. Allard,* 444 U.S. 51, 65 (1979); *Kaiser Aetna v. United States,* 444 U.S. 164 at 175 (1979); *Nollan v. California Coastal Commission, supra; Connolly v. Pension Benefit Guaranty Corp., supra,* 475 U.S. 211, 224; *Ruckelshaus v. Monsanto Co., supra.*)

2. The need to preserve to the courts the ability to weigh the full facts is essential to the legitimate land use planning objectives of state and local governments. Concurrent with an evaluation of the economic impacts of a regulation on a particular piece of property, courts must have the ability to review the facts compelling enactment of the regulation, along with the realistic expectations of the property owner who has alleged an unconstitutional deprivation. Without these components of the *Penn Central* and *Agins* formula, "justice and fairness" could never properly be served; the balance would always tilt in the direction of the property owner, no matter how attenuated his hopes of using the land or how compelling the state interest.

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[13] The Court in decisions subsequent to *Penn Central* and *Agins* has occasionally cited one formulation of the multifaced test or another. *Cf. Bowen v. Gilliard, supra,* 483 U.S. 587, 606 (1987) and *Connolly v. Pension Benefit Guaranty Corp.,* 475 U.S. 211, 224-225 (1986) (citing *Penn Central* formulation of standard) with *Nollan, supra,* 483 U.S. at 834 (citing *Agins*). In any event, we believe these statements effectively require the same balancing of public and private interests. Indeed, the Court itself has so construed the operative *Penn Central* and *Agins* language. See *Keystone, supra,* 480 U.S. at 470. Under the *Penn Central/Agins* test, in the event a regulatory measure deprives the property owner of substantially all economic use, it is likely that a compensable taking will be found to have transpired unless consideration of the other applicable criteria strongly compel a contrary result.

For example, development of arid land, unsuitable for agriculture and far from existing cities, requiring massive public sector investment to provide basic urban services, could not under petitioner's theory be subjected to even the most traditional restrictions on density, height, and so forth. This is because compliance with such restrictions would preclude profitable development, given the tremendous infrastructure costs. Measurement purely of the economic impacts would thus prevent regulation of lands *most* ill-suited for development. It could also in effect make government the guarantor of an investor's profits, since any diminution in value resulting from governmental action would necessarily require reimbursement by the state. This in turn could encourage improvident speculation by investors comfortable in the knowledge that, no matter how likely their property would be subject to reasonable government restrictions, the government will nevertheless have to pay for those restrictions.

There is thus no basis in the law, and no support in logic or reason, for petitioner's suggestion that this Court adopt a test for determining when a taking has occurred that measures the economic impact of a government regulation on a property owner to the exclusion of the other components of the *Penn Central/Agins* test.

Since the facts necessary to apply the *Penn Central/Agins* test have not been developed on the present record, the Court should follow the suggestion of the Solicitor General and remand this proceeding to the South Carolina courts for further development of the evidence, if the Court determines that the nuisance exception does not apply for any reason. (See discussion in part II, *supra*.)

IV.

PETITIONER'S PERMANENT TAKINGS CLAIM IS MOOT TO THE EXTENT IT IS BASED ON THE 1988 ACT AND UNRIPE TO THE EXTENT IT IS BASED ON THE 1990 AMENDMENTS TO THE SOUTH CAROLINA ACT.

The procedural posture of this case deprives it of the justiciability required for review by this Court, both under established principles of mootness and ripeness.

A. This Controversy Is Moot Because The 1990 Amendments to The Act Permitting Construction on Petitioner's Property Have Eviscerated Petitioner's Permanent Takings Challenge to the 1988 Act.

Mootness principles incorporate Article III's "case and controversy" requirement, as well as precepts of judicial restraint and economy. (*Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 602 (1982); see generally, Wright, Miller & Cooper, 13 *Federal Practice and Procedure*, § 3533 et seq. (2d ed. 1984).) An actual controversy must be extant at all stages of judicial review, not merely at the time the complaint is filed. *Steffel v. Thompson*, 415 U.S. 452, 459 n.10 (1974). Courts must apply the law existing at the time the case reaches them, and take appropriate action when amendment of the statute or regulation renders the relief sought unnecessary or inappropriate. (*Cort v. Ash*, 422 U.S. 66, 74-76 (1975); *Dinsmore v. Southern Express Co.* 183 U.S. 115 (1901); Wright, Miller & Cooper, *supra*, § 3533.6.)

In 1990, during the pendency of petitioner's appeal to the South Carolina Supreme Court, the state legislature amended the 1988 Act to permit construction of habitable structures on beachfront lands, including the lots owned by petitioner. These amendments were designed to address the impacts that the setback rule would have on coastal property owners such as petitioner; he is now entitled to apply for a permit to build on his property.

Any permanent grievance that petitioner may validly have had because of the effects of the 1988 Act evaporated when South Carolina modified the Act. Property owners such as petitioner currently have an opportunity to pursue development of their land. Accordingly, petitioner can no longer maintain that the 1988 Act permanently deprived him of any chance to develop his land. (*See Fusari v. Steinberg*, 419 U.S. 379 (1975); *United States v. Munsingwear*, 340 U.S. 36 (1950).)

B. Petitioner's Permanent Takings Claim Does Not Meet this Court's Ripeness Criteria, Which Require Petitioner to Seek a Final Authoritative Decision, Including an Available Variance, Before Pursuing Relief Based on the U.S. Constitution.

Ripeness is a key jurisprudential threshold requirement which can and must be considered at the appellate level as well as in the trial court. (*Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186-189 (1985); *MacDonald, Sommer and Frates v. County of Yolo*, 477 U.S. 340 (1986), Wright, Miller & Cooper, *supra*, at § 3532.3.) This Court has repeatedly noted the special importance in land use cases of first deciding whether the plaintiff has taken the necessary steps so that the Court knows what is and is not allowed to be done with the subject parcel. (*Ibid.*)

The Court has consistently held that a constitutional challenge to a land use regulation is not ripe where the property owner has failed to apply for a variance or to seek a determination of whether a permit would be issued by the regulating agency. (See *Agins v. City of Tiburon*, *supra*, 447 U.S. at 260 (1980); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 633 (1981); *MacDonald*, *supra*, 477 U.S. at 348-351 (1986).) This is not an arbitrary rule. As the Court has noted: "Our reluctance to examine takings claims until such a final decision has been made is compelled by the very nature of the inquiry required by the Just Compensation Clause." (*Williamson*

County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172, 190 (1985).)

In the instant case, petitioner's permanent takings claim is not ripe because he has not sought relief under the provisions of the 1990 amendments, which provide a permit process that may well allow construction on his property. Section 48-39-290 of the Act, as amended in 1990, and Section R.30-15(F) of respondent's implementing regulations clearly give petitioner the right to seek a special permit allowing the very type of development on his land that he says he contemplated. Accordingly, the 1990 amendments provide petitioner a clear administrative avenue of relief. Yet petitioner has not pursued this option and, indeed, has filed no application whatsoever. Respondent has thus never been given the opportunity to determine under the 1990 statute whether and how residential development of the type contemplated by petitioner is consistent with state law. Thus it is premature to determine whether and how the Act has worked a permanent taking of his property requiring compensation.[14]

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[14] Petitioner advances the theory that he has at least suffered a "temporary taking" for which compensation is required. From this he contends that the case remains ripe for adjudication on the merits. (Petitioner's Brief on the Merits at pp. 27-28, n.5.) This ignores that fact that the South Carolina courts have never had an opportunity to deal with the discrete temporary takings issue because the parties stipulated in the trial court that respondent *reserved* the right to argue and contest any such challenge petitioner might later choose to advance. (Tr. 14, Stipulation 14.) Under these circumstances, petitioner should be required to litigate any such temporary takings claim in the first instance in the state courts. This would allow those tribunals to engage in the essentially fact-based inquiry as to whether a temporary taking has transpired under the facts and criteria identified in *First English*, *supra*, 482 U.S. at 322, *Agins v. City of Tiburon*, *supra*, 447 U.S. 255, 263, and related cases.

CONCLUSION

The decision of the South Carolina Supreme Court should therefore be affirmed, the petition should be dismissed as improvidently granted or, alternatively, the Court should remand this matter to the lower court for further proceedings.

Dated: January 30, 1992

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General

RODERICK E. WALSTON
Chief Assistant Attorney General

JAN S. STEVENS
Assistant Attorney General

*RICHARD M. FRANK
CRAIG C. THOMPSON
Supervising Deputy Attorneys General

MARIA DANTE BROWN
VIRNA L. SANTOS
Deputy Attorneys General

(*Counsel of Record)

Counsel for Amicus Curiae
State of California

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No. 91-453

In The

Supreme Court of the United States

October Term, 1991

DAVID H. LUCAS,

Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of The State Of South Carolina

BRIEF FOR AMERICAN PLANNING ASSOCIATION AND TAHOE REGIONAL PLANNING AGENCY AS AMICI CURIAE IN SUPPORT OF RESPONDENT

GARY A. OWEN
CROWELL, SUSICH, OWEN
& TACKES, LTD.
510 W. Fourth Street
Post Office Box 1000
Carson City, Nevada 89702
(702) 882-1311

Of Counsel for Amicus Curiae Tahoe Regional Planning Agency

H. BISSELL CAREY, III*
ROBINSON & COLE
One Commercial Plaza
Hartford, Connecticut 06103
(203) 275-8200

Counsel for Amici Curiae American Planning Association and Tahoe Regional Planning Agency

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTERESTS OF THE AMERICAN PLANNING ASSOCIATION AND TAHOE REGIONAL PLANNING AGENCY

The American Planning Association ("APA") is a non-profit association of 27,000 members, all of whom are employed in the field of land use planning or are otherwise vitally concerned with the discipline.

Virtually all members of APA are engaged in land use planning either on behalf of governmental bodies exercising regulatory authority over the use of real property or for the benefit of holders of land subject to land use regulation. Consequently, APA does not represent the interests of those who seek to increase the constitutionally permissible scope of government regulation or promote the interests, constitutional or otherwise of individual landowners. APA and its members are fundamentally and vitally interested in the promotion of the rational, predictable, effective, and beneficial use of real property consistent with the needs of individuals having recognized interests in property and the public at large. APA members are the professionals who engage in the planning to accomplish that fundamental goal.

The Tahoe Regional Planning Agency ("TRPA") is an entity created by an interstate compact between the States of California and Nevada, approved by Congress. Tahoe Regional Planning Compact, Pub. L. 91-148, 83 Stat. 360 (1969), *amended* Pub. L. 96-551, 94 Stat. 3233 (1980). Its jurisdiction encompasses the Lake Tahoe Basin, an approximately 325 square-mile environmentally fragile air and water basin whose focal point is Lake Tahoe. TRPA is charged by the Compact with adopting and implementing a regional plan of resource conservation to stem the rather rapid deterioration of Lake Tahoe and its environs. The agency has adopted a plan implementing regulations, including the regulation of development near and around Lake Tahoe.

Land use planning alone, however, does not translate to rational, predictable, effective, and beneficial land use without enforceable regulations to implement the plans made to accomplish those purposes. Effective implementation of sound land use planning is threatened by Petitioner's suggestion that this Court adopt a

rule which, in essence, makes the "market value" of property *the* determinant factor in considering whether the application of an admittedly valid[1] land use regulation results in a "taking" under the Fifth Amendment. It is this suggestion, and its impact on land use planning, which causes APA and TRPA to file this brief as *amici curiae*.

APA and TRPA submit this brief as *amici curiae* pursuant to Supreme Court Rule 37.[2]

STATEMENT OF THE CASE

Respondent's Brief offers a concise, complete factual statement of the underlying dispute and procedural history leading to the grant of certiorari by this Court on November 18, 1991. Certain facts either of record or subject to judicial notice of this Court require emphasis for purposes of the arguments made herein.

First, South Carolina's 1988 Beachfront Management Act, 1988 Act No. 634, *codified* at S.C. Code Ann. § 48-39-250 *et seq.*, (the "Act"), the legislation giving rise to Petitioner's claim, was amended effective on June 25, 1990,[3] to provide a means by which a landowner, prevented by operation of the Act from constructing any structure on its property, may obtain a permit to do so. 1990 Act No. 607, s. 3

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[1] The parties hereto have so stipulated. *Lucas v. South Carolina Coastal Council*, ___ S.C. ___, 404 S.E.2d 895 (1991), *citing* Respondent's Brief to the South Carolina Supreme Court, p. 4.

[2] Written consent for the filing of this brief has been granted by counsel for all parties. Letters of consent have been filed with the Clerk of this Court.

[3] The bill which eventually became known as 1990 Act No. 607 was first introduced in the South Carolina legislature on February 16, 1989, less than a year after the 1988 Beachfront Management Act became effective. It was immediately referred to committee, and reported out favorably on April 25, 1989, but languished until a joint conference report of both houses adopted the measure on June 19, 1990. The 1990 amendment took effect upon signature of the governor on June 25, 1990.

codified at S.C. Code Ann. § 48-39-290(D) (1990 Supp.) (the "1990 amendments"). The record does not reveal whether Petitioner has submitted an application for a building permit under the Act as amended.[4]

Second, Petitioner purchased his two lots in 1986. Petitioner never obtained *any* permit to construct any structure on either of his lots. Transcript of Record from South Carolina Supreme Court ("Transcript"), pp. 39-40.

Last, many of "public harms" identified by the South Carolina legislature, the same harms so readily belittled as either insignificant[5] or secondary[6] to the purposes of the Act, became menacingly real with the onslaught of Hurricane Hugo in 1989. The impact of that storm, typical of hurricanes which affect the South Carolina seacoast regularly,[7] is one of public record, judicial notice of which is appropriate.[8]

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[4] Respondent has, however, indicated to Counsel of Record that Petitioner has, in fact, failed to apply for any such permit.

[5] Petitioner opines that "[i]t is readily apparent that the underlying purpose" of the Act was to promote tourism and the public use of South Carolina's beaches. Petitioner's Brief on the Merits, p. 39.

[6] The dissent to the decision below would have found, as a matter of law, that the "primary" purpose of the Act was not the prevention of a "nuisance." *Lucas v. South Carolina Coastal Council*, ___ S.C. ___, 404 S.E. 2d 895, 905 (1991).

[7] *See, e.g.*, Simpson, Robert R. and Herbert Riehl, *The Hurricane and Its Impact*, (1981).

[8] Fed. Rules of Evid. 201(b), 28 U.S.C. *See also Elwood v. City of New York*, 450 F. Supp. 846 (D.C.N.Y. 1978), *rev'd on other grounds*, 606 F.2d 358, *cert. denied*, 447 U.S. 906 (1980) (acknowledges the power of the Court to take judicial notice of scientifically verifiable facts); *American Indians Residing on Maricopa-Ak Chin Reservation v. United States*, 667 F.2d 980 (U.S.C.C. 1981), *cert. denied*, 456 U.S. 9089 (1982) (allows judicial notice of information in public records); *Fair Ocean Co., Ltd. v. Cargo or Permina Samudra XII*, 423 F. Supp. 1037 (D.C. Guam 1976) (permits judicial notice of tropical storm conditions.).

Estimated to have generated a storm surge of between 10 to 13 feet above normal,[9] Hurricane Hugo swept ashore during the Fall of 1989 inundating virtually all of the Isle of Palms. Despite the revetment running southerly from seaward of lot 23 (constructed to provide protection from the sea, and presumably providing the same for lots to the south of lot 23) and a nourishment project on the beach, (Joint Appendix, pp. 2-3), the residences on either side of Petitioner's lots, as well as structures immediately in back of these lots, were substantially damaged. During the first years after Hurricane Hugo, building permits were issued in the Isle of Palms for two-thirds of the buildings that existed before the store. One out of twenty were completely destroyed.[10]

SUMMARY OF ARGUMENT

It is not hyperbole to suggest that Petitioner invites the Court to render a decision in this matter which would, in the final analysis, cause a significant and essentially detrimental upheaval in the law of "regulating takings,"[11] one that would impede the government's ability to rationally plan and

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[9] BCD Council of Governments, *The Isle of Palms. Hurricane Hugo: One Year Later*, p. ii.

[10] *Id.*, pp. 10-11.

[11] Of substantial concern is the fact that this challenge is made in the context of a regulation which has as one of its many purposes the preservation of environmentally sensitive land in a condition which will permit it to perform its naturally *protective* role. It is unchallenged that the legislation would have promoted that worthy purpose. As pointed out *infra*, a vast panoply of state and federal jurisprudence has insulated regulation seeking to protect environmentally sensitive areas from development against "taking" claims, even where the impact on the "market value" of the property subject of the regulation has been significant.

regulate the use of property.[12] Petitioner urges the abandonment of the multi-faceted, *ad hoc* and admittedly difficult factual inquiry traditionally involved in Fifth Amendment "taking" jurisprudence in favor of a single, economically predicated, litmus test used to determine real estate entrepreneurial failure: no present "market value."[13]

As demonstrated below, the Court should reject Petitioner's impassioned plea to have this Court construe the Fifth Amendment to require constitutional preservation of the value of his assets by adopting a single, simplistic litmus test as to when the application of a land use regulation "goes too far."[14]

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[12] Even Justice Holmes, whose opinion is so frequently relied upon to support the economic use test for takings jurisprudence, forewarned that, "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. . . . some values are enjoyed under an implied limitation and must yield to the police power." *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 413 (1922).

[13] Petitioner states his position as follows:

> . . . the enforcement of land-use regulations which have the effect of *eliminating the value of private property* should be *per se* subject to the just compensation requirement of the Fifth Amendment.

Petitioner's Brief on the Merits, p. 19 (emphasis provided).

It is clear from the trial record that Petitioner is referring to the "market value" of his property at the time the Act was first applied to his property, *i.e.* when the "baseline" and "setback" lines were established along the shoreline where his property is located. (Transcript, pp. 31-5, 48-9).

[14] *Pennsylvania Coal v. Mahon*, 260 U.S. 393 (1922). It is not surprising, in light of the competing constitutional and public policy concerns involved in the issue, that a "litmus test" to determine if a "taking" has occurred has managed to elude the United States Supreme Court. *E.g.*, *Penn Central Transportation Co. v. New York*, 438 U.S. 104, 123-4 (1977). It is surprising, however, that Petitioner views that the same constitutional and public policy tensions are now in some way resolved to permit the adoption of the singularly simple solution he suggests.

That is not to say that Petitioner's *property rights* do not or should not enjoy constitutional protection or that those same rights do not or should not enjoy that protection through judicial intervention. It is to say that one's property is not "taken" under the Fifth Amendment if the record reveals that there has been nothing more than a temporal impact on its value allegedly caused by application of a state regulation which is, by stipulation of the parties and according to that state's highest court, designed to prevent a recognized and serious public harm. This is particularly true, we urge, if the property owner has not availed himself of the opportunity to seek to regain all or most of the value allegedly lost, if the uses prohibited by the allegedly offending legislation, relied upon as the foundation of the property's "market value," do not enjoy constitutional protection, and if the property owner retains most if not all of the traditionally recognized "bundle of rights" in the property.

ARGUMENT

I. THE SOUTH CAROLINA SUPREME COURT'S RELIANCE ON THE RULE FIRST SET FORTH IN *MUGLER V. KANSAS*, 123 U.S. 623 (1887) TO PRECLUDE PETITIONER'S FIFTH AMENDMENT TAKING CLAIM WAS APPROPRIATE UNDER THE CIRCUMSTANCES OF THE CASE PRESENTED.

After what the Transcript reveals to have been a brief trial, the Court of common Pleas, Charleston County, South Carolina found that "[t]he effect of the setback line imposed by the beachfront Management Act on Lucas's two lots is to render property which was otherwise perfectly suitable for single-family residential development valueless."[15]

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[15] The trial court also found that "enforcement of the Beachfront Management Act has deprived Lucas of all of the essential elements of ownership." Pet. App., p. 39. This finding was made, presumably, on the strength of the conclusion that "essential elements of ownership" are defined as those having monetary or market value. It is respectfully suggested that the trial court's conclusion on this score is incorrect, at least as it applies to the Fifth Amendment. *See* Section III, *infra*.

Petitioner's Appendix to Petition for Certiorari ("Pet. App."). The trial court then concluded that the application of the Act to Petitioner's vacant lots resulted in a "taking" of that property under the Fifth Amendment of the United States Constitution.[16]

On appeal, the South Carolina Supreme Court held that the purposes of the Act were to prevent a recognized public harm, and because neither the validity of the Act nor the findings of the South Carolina legislature with respect to its purposes went unchallenged in the trial court, the rule set forth in *Mugler v. Kansas*, 123 U.S. 623 (1887) and its progeny should apply. It therefore reversed the decision of the lower court. *Lucas v. South Carolina Coastal Council*, ___ S.C. ___, 404 S.E.2d 895 (S.C. 1991), *cert. granted*, ___ U.S. ___, 112 S.Ct. 436 (1991). Petitioner sought, and was granted, a writ of certiorari. This appeal, therefore, contests the validity of the South Carolina Supreme Court's application of what it dubbed as the "*Mugler* rule" to Petitioner's claim.

As noted by the South Carolina Supreme Court, this Court's decision in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) put to rest any remaining notion that *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) had, in essence, eviscerated the essential holding of *Mugler v. Kansas*, 123 U.S. 623 (1887). *Lucas v. South Carolina Coastal Council*, ___ S.C. ___, 404 S.E.2d 895 (S.C. 1991), *cert. granted*, ___ U.S. ___, 112 S.Ct. 436 (1991). *Keystone* not only affirmed the viability of *Mugler* and its progeny but also by virtue of its reliance on the application of the rule set forth in those cases sought to explain and define the rule itself. *Keystone Bituminous Coal Ass'n v. DeBenedictis, supra*, 480 U.S. at 488-492.

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[16] The Circuit Court ordered the payment of compensation for the lots as a result of its finding and, upon payment, the transfer of title to the State of South Carolina. No alternative remedy was ordered. Pet. App., pp. 40-41. *See* Section III, *infra*, pp. 21-29.

Ironically, this Court began its analysis with the teachings of the same decision which purportedly cast doubt on the viability of *Mugler* and other similar cases:

> In *Pennsylvania Coal* the Court recognized that the nature of the State's interest in the regulation is a critical factor in determining whether a taking has occurred, and thus whether compensation is required. . . .
>
> * * *
>
> Many cases before and since *Pennsylvania Coal* have recognized that the *nature* of the State's action is critical in takings analysis.

Id., 480 U.S. at 488 (emphasis supplied).[17] The *Keystone* dissent agreed, emphasizing that the "nature" of the regulation "may be relevant, for we have recognized that a taking does not occur where the government exercises its unquestioned authority to prevent a property owner from using his property to injure others *without having to compensate the value of the forbidden use*." *Id.*, 480 U.S. at 511 (emphasis supplied, citations omitted). After quoting at length from Justice Harlan's opinion in *Mugler v. Kansas* and referring with favor to other precedent supporting the conclusion that the nature of the State's action is a predominant factor in the required " . . . weighing of private and public interests", *Id.*, 480 U.S. at 492, the Court held:

> The Court's hesitance to find a taking when the State merely restrains uses of property that are tantamount to public nuisances is consistent with the notion of "reciprocity of advantage" that Justice Holmes referred to in *Pennsylvania Coal* . . . While

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[17] The Court also pointed out that

> . . . the type of taking alleged is also an often critical factor. . . .While the Court has almost invariably found that the permanent physical occupation of property constitutes a taking, (citation omitted) the Court has repeatedly upheld regulations that destroy or adversely affect real property interests (citations omitted).

Id., 480 U.S. at 488-9, n. 18.

> each of us is burdened somewhat by [land use regulations], we, in turn, benefit greatly from the restrictions that are placed on others (citation omitted). Long ago it was recognized that "all property in this county is held under the implied obligation that the *owner's use of it shall not be injurious to the community*," (citations omitted) and the Takings Clause did not transform that principle to one that requires compensation whenever the state asserts its power to enforce it.

Id., 480 U.S. at 491-2 (emphasis supplied). As a result, the Court explained, "the public interest in preventing activities similar to public nuisances is a substantial one, which in many instances has not required compensation . . . " and then held that the regulation at issue in *Keystone* " . . . plainly seeks to further such an interest." *Id.*, 480 U.S. at 492.

Petitioner argues that the "*Mugler* rule" should be narrowly construed and, if so construed, that the Act at issue here would not fall within the so-called "nuisance exception."[18] It is therefore appropriate, and possibly determinative, to examine certain aspects of the rule which are pertinent to the inquiry presently before the Court.

Clearly, the rule has been applied to uphold the regulation of uses other than those which are found to be "nuisances *per se*." Comparing the facts in *Reinman v. Little Rock*, 237 U.S. 171 (1915), to the case before it, the Court in *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) stated that

> . . . [t]here was a prohibition of a business, lawful in itself, there as here. It was a livery stable there; a brick yard here. They differ in particulars, but they are alike in that which cause and justify prohibition in defined localities – that is, the effect upon the health and comfort of the community. . . . This court said of [the ordinance at issue in *Reinman*]: "granting that the business was not a nuisance per se, it was clearly within the police power of the State to regulate it," and to that end to declare that

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[18] This phrase was apparently coined by the dissent in *Penn Central Transportation Co. v. New York City*, 438 U.S. at 145.

> in particular circumstances and in particular localities a livery stable shall be deemed a nuisance in fact and in law."

Hadacheck v. Sebastian, 239 U.S. at 410-411, quoting *Reinman v. Little Rock*, 237 U.S. at 171. This same principle has been more graphically expressed as follows:

> Thus the question whether the power exists to forbid the erection of a building of a particular kind or for a particular use, like the question of whether a particular thing is a nuisance, is to be determined, not by the abstract consideration of the building or of the thing considered apart, but *by considering it in connection with the circumstances and the locality*. (Citation omitted). *A nuisance may be merely a right thing in the wrong place,-like a pig in the parlor instead of the barnyard.*

Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926) (emphasis provided).[19]

The Court need not engage in consideration of whether the use prohibited by a challenged regulation " . . . constitute(s) a nuisance according to common law; or whether they may be so declared by state." *Keystone Bituminous Coal Ass'n v. DeBenedictis, supra*, 480 U.S. at 490. Rather, if it is "clear that the exercise of [the] police power to prevent [an] impending danger is justified," then the prohibition of that use does "not require compensation." *Id.*

This is hardly a novel concept in the jurisprudence of this Court; it enjoys the support and endorsement of the great

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[19] Numerous state decisions follow the original *Mugler* rationale that some potentially harmful activities are simply unreasonable uses of land and to deny them does not deny the reasonable use of land – it merely requires the landowner to act reasonably. *See, e.g., Spiegle v. Borough of Beach Haven*, 46 N.J. Super. 479, 491-92, 218 A.2d 129, 137 (1966), *cert. denied*, 385 U.S. 831 (1966). *See also* Norman Williams, Jr., *American Land Planning Law: Land Use and the Police Power* (1974-75) and Rohan, *Zoning and Land Use Controls* § 18.04[3][ii] (1991). For the Court now to alter this century-long precedent in the state cases would wreak havoc in the 50 states that have relied on it in creating and administering their land use systems.

weight of this century's Supreme Court precedent. As held in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1977):

> [M]ore importantly for the present case, in instances in which a state tribunal reasonably concluded that "the health, safety, morals, or general welfare" would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that *destroyed* or adversely affected *recognized real property interests*. *See Nectow v. Cambridge*, 277 U.S. 183, 188 (1928) Zoning laws are, of course, the classic example (citations omitted) which have been viewed as permissible governmental action even when prohibiting the most beneficial use of the property (citations omitted).

Id., 438 U.S. at 125.

Lastly, the use prohibited need not be "noxious." As explained by this Court in *Penn Central*:

> We observe that the uses in issue in *Hadacheck*, *Miller* [*v. Schoene*, 276 U.S. 272 (1928)], and *Goldblatt* [*v. Hempstead*, 369 U.S. 590 (1962)] were perfectly lawful in themselves. They involved no "blameworthiness, . . . moral wrongdoing or conscious act of dangerous risk taking which induce[d society] to shift the cost to a pa[rt]icular individual." (Citation omitted). These cases are better understood as resting not on any supposed "noxious" quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy – not unlike historic preservation – expected to produce a widespread public benefit and applicable to all similarly situated property.

Id. 438 U.S. at 133-4, n. 30.

Not surprisingly, and of particular significance to this appeal, land use regulations regarding shoreline construction, on the strength of the public purposes of either the preservation of the environment or the prevention of harm from

environmental forces, have been upheld against taking challenges, even when the effect of the regulation is the destruction of property interests or value in the property impacted. *E.g., McCarthy v. City of Manhattan Beach*, 264 P.2d 932 (Cal. 1953), *cert. denied*, 348 U.S. 817 (1954) (a regulation preventing construction of a structure on a California beach upheld); *Town of Indialantic v. McNulty*, 400 So.2d 1227 (Fla. App. Dist. 5 1981), and *McNulty v. Town of Indialantic*, 727 F. Supp. 604 (M.D. Fla. 1989) (an oceanfront setback very similar to the regulation involved in the case at bar upheld). *See also Spiegle v. Borough of Beach Haven*, 218 A.2d 129 (N.J.), *cert. denied*, 385 U.S. 831 (1966).

The same principles have been applied in the consideration of the regulation to flood hazard areas. *Turner v. County of Del Norte*, 101 Cal.Rptr. 93 (Cal. 1972); *Turnpike Realty Co. v. Town of Dedham*, 284 N.E.2d 891 (Mass. 1972); *cert. denied*, 409 U.S. 1108 (1973); *Usdin v. Dep't of Envir. Protection*, 414 A.2d 280 (N.J. 1980), *aff'd*, 430 A.2d 949 (1981); *Maple Leaf Investors, Inc. v. State Dep't of Ecology*, 565 P.2d 1162 (Wash. 1977) (en banc).

Similarly, the right of an owner to build in sensitive wetlands and coastal marshes in ways that harm public interests has been prohibited in numerous states, yet these regulations have been held not to constitute a taking even where the regulatory prohibition results in no structural development of the environmentally sensitive land being feasible. *E.g., Candlestick Properties, Inc. v. San Francisco Bay Conservation & Dev. Comm'n*, 89 Cal.Rptr. 897 (Cal. 1973); *Potomac Sand & Gravel Co. v. Governor of Maryland*, 293 A.2d 241 (Md. 1972), *cert. denied*, 409 U.S. 1040 (1972); *Carter v. South Carolina Coastal Council*, 314 S.E. 2d 327 (S.C. 1984); *Orion Corp. v. State of Washington*, 747 P.2d 1062 (Wash. 1987), *cert. denied*, 486 U.S. 1022 (1988); *Just v. Marinette County*, 201 N.W.2d 761 (Wis. 1972).

Petitioner advances the view, in a mild variation from that advocated by the dissent below, that the "underlying purpose" of the legislation is more concerned with "promoting a public good" than the prevention of public harm.[20] First, the unambiguous language of the legislative findings regarding the necessity of the beach/dune system clearly refute any contention that the Act did not have as at least one of its primary purposes the prevention of a public harm. *See* S.C. Code Ann. § 48-39-250(1)(a), (c); § 48-39-250(2)-(4), (6); § 48-39-260(1)(a), (d).

Petitioner and others[21] advance the argument that "residential construction" can hardly be regarded as a "nuisance" or a "noxious use" of property. Petitioner's Brief on the Merits, pp. 41-45. The argument begs the question. The fact that a traditionally accepted use of property is prohibited does not obviate the application of the *Mugler* rule to insulate the prohibition from a taking claim.[22] It may be true that

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[20] Curiously, but not surprisingly in light of the legislative findings of the Act itself, the dissent below implicitly recognized (by stating that the Act does not have as its "*primary* purpose the prevention of a nuisance.") that at least one purpose of the Act was the prevention of a public harm. *Lucas v. South Carolina Coastal Council*, 404 S.E.2d at 905 (Dissent of Harwell, A.J.).

[21] *See* the dissenting opinion below, *Lucas v. South Carolina Coastal Council*, 404 S.E.2d at 902 and *Amicus Curiae* brief of the United States, p. ___.

[22] Petitioner objects to what it regards as the unjustified conclusion of the South Carolina Supreme Court that he conceded that the use he intended for his two lots was a "nuisance." Petitioner's Brief on the Merits, p. 10. As demonstrated, *supra*, the label one puts on a "use" is not pivotal. What is pivotal is the fact that the "use" is forbidden as a result of the valid exercise of the police power to mitigate or avoid a public harm.

residential building on the shoreline is traditionally regarded as an acceptable use of shoreline property. Of course, all of the uses prohibited by the challenged regulations in *Mugler*, *Hadacheck*, *Reinman*, *Goldblatt*, and *Keystone*, not to mention the panoply of uses involved in the profusion of federal and state decisions upholding zoning regulations prohibiting those uses, were legally acceptable uses of real property prior to the legislative determination that they should be prohibited. Any given use "in particular circumstances and in particular localities" may be declared a nuisance in fact and in law. *Hadacheck v. Sebastian*, 239 U.S. at 411. The South Carolina legislature has found, and Petitioner has not contested, that construction on his lots is, under the particular circumstances – *i.e.*, the uncontested need to preserve the beach/dune system to provide, among other things, protection to people and property – and in the particular locality – *i.e.*, within the area designated as within that system – a use which is harmful to the public. Hence, even if the construction of a residence is regarded in the abstract as an entirely appropriate and innocuous use, that same use in the circumstances and in the location identified by the South Carolina legislature may properly be regarded as a "nuisance." Here, construction in the shoreline area comprising Petitioner's lots is " . . . merely the right thing in the wrong place, – like a pig in a parlor instead of a barnyard." *Euclid v. Ambler Realty Co.*, 272 U.S. at 388.

If legislation declaring a particular use the legal equivalent of a nuisance withstands judicial scrutiny, the public interest is deemed sufficient to uphold the regulation against a taking claim. *Keystone Bituminous Coal Ass'n v. DeBenedictis, supra*, 480 U.S. at 490. The determinative question, then, is whether the Act *can* withstand "judicial scrutiny."

The Act has already been at least reviewed by the South Carolina Supreme Court, and has passed muster. Moreover, it is respectfully suggested that there is no cause for the application of this Court's "scrutiny" where the constitutional validity of the Act was not an issue raised below. A police power regulation enjoys a strong presumption of validity. *E.g.*,

American Federation of Labor v. American Sash & Door Co., 335 U.S. 538 (1949). In the case of *Sproles v. Binford*, 286 U.S. 374 (1932), this Court held that, "(w)hen the subject lies within the police power of the State, debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside because compliance is burdensome." *Id.*, 286 U.S. at 388-9. Applying this principle, the Fourth Circuit Court of Appeals, while reviewing precisely the same legislation involved here, held that it would be inappropriate to "second guess" the determination of the South Carolina Assembly that the Act substantially advanced an important state interest. *Esposito v. South Carolina Coastal Council*, 939 F.2d 165 (4th Cir. 1991), *petition for cert. filed*, 60 U.S.L.W. 3505 (U.S. Dec. 5, 1991) (No. 91-941). Further, the decision of the South Carolina Supreme Court and the Petitioner's identification of the Question Presented to this Court make it clear that Petitioner has never raised the validity of the statute, *per se*, for review. *See* Rules of the Supreme Court, 24.1(a). The jurisdictional statute, 28 U.S.C. § 1257, indisputably gives this Court the power to review the constitutionality of a state statute, but the rules suggest that it would do so only if the question is raised by the Petitioner or there is plain error in the statute. It stands as a matter of general principle that the Court will not review a question of statutory validity that has not been properly presented. *C.I.O. v. McAdory*, 325 U.S. 472 (1945).

Even if the Act were to be examined anew by this Court to determine whether it "substantially advances legitimate state interests," *e.g.*, *Nollan v. California Coastal Commission*, 483 U.S. 825, 834 and n. 3 (1987), it is clear that, given the record in this case, the allegedly offending regulation would pass the test. The findings of the South Carolina legislature are clear, concise, and uncontradicted by the Petitioner. The record is void of any evidence which would in any way contest the legislative findings regarding the public interests served by the Act, its purposes, and the legitimacy of the means chosen to accomplish those purposes. The South Carolina legislature has found that construction or reconstruction

of other than certain specifically authorized things within a specified distance from the shoreline will interfere with the continued viability of the South Carolina beach/dune system, which in turn the legislature found to be an important natural resource serving, among other natural and essential purposes, to prevent and/or mitigate the undeniable harm occasioned by storms and the sea. In order to prevent the public harm occasioned by the continued destruction of the beach/dune system, the legislature chose to utilize the obvious and most direct means: to eventually eliminate what it found to be the cause of the harm by prohibiting new construction or reconstruction which would threaten the continued viability of the valuable resource.

The national trend since the mid-1970's has been to secure a better understanding of the dynamics of barrier islands, storms and erosion and to apply reasonable setback regulations for those highly hazardous areas. The Flood Disaster Protection Act of 1973 (P.L. 93-234, Section 107) was adopted to include erosion hazards within the risks to be addressed by the federal flood insurance program. The regulations adopted to implement this program have, since 1976, provided that where erosion prone areas are identified, local regulations should "require setbacks for all new development from the ocean to create a safety buffer. The buffer may be used for suitable open space purposes and for other activities using temporary and portable structures only." 44 C.F.R. Part 60.S. Some thirteen coastal states have adopted minimum setbacks for development in high hazard areas along the oceans and Great Lakes.[23] The National Research Council has

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[23] Center for Urban and Regional Studies, University of North Carolina, *Evaluation of the National Coastal Zone Management Program* at 69 (1991). For discussion of the state minimum oceanfront setback requirements of other states, *see, e.g.*, Hildreth, *Coastal Natural Hazards Management*, 59 Oreg. L. Rev. 201 (1980); Maloney and O'Donnell, *Drawing the Line at the Oceanfront*, 30 Fla. L. Rev. 393 (1978); Owens, *Coastal Management in North Carolina: Building a Regional Consensus*, 51 J. Am. Plan. Assoc. 322, 325-27 (1985); Shows, *Florida's Coastal Setback Line – An Effort to Regulate Oceanfront Development*, 4 Coastal Z. Mngt. J. 151 (1978).

recommended that all coastal states adopt minimum oceanfront setbacks even more substantial than the one involved in this case, and that such be a mandated part of the federal flood insurance program.[24] The team of experts who reviewed this area of South Carolina after Hurricane Hugo concluded that "[i]t is crucial that the concept of a gradual, strategic retreat from the ocean remain a part of coastal management at the state level and that the local communities participate in the process by adopting the Local Comprehensive Shorefront Management Plans. These plans are to include the development and adoption of local ordinances to protect sand dunes and provide for setback requirements."[25] In short, South Carolina is not alone in recognizing the need for Shoreline Management regulations which prohibit the construction of, among other things, private residences within the beach/dune system.

Given the true nature and clear applicability of the *Mugler* rule revealed by more than a century of Supreme Court precedent, and given the undeniable weight to be accorded the Act because of the legitimate interest of the State of South Carolina to provide for the continued viability of an important and *protective* natural resource, it is respectfully submitted that the decision of the South Carolina Supreme Court should be affirmed.

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[24] National Research Council, *Managing Coastal Erosion* (1990).

[25] Federal Emergency Management Agency, *Interagency Hazard Mitigation Team Report: Hurricane Hugo* at 18-19 (Report No. 843-DR-SE, October 1989).

II. IF THE COURT CONCLUDES THAT THE *MUGLER* DOCTRINE SHOULD NOT HAVE BEEN APPLIED TO PRECLUDE PETITIONER'S CLAIM, THIS COURT SHOULD FAVORABLY CONSIDER A REMAND FOR FURTHER PROCEEDINGS TO PERMIT THE SOUTH CAROLINA COURTS TO DETERMINE, UTILIZING OTHERWISE APPLICABLE PRECEDENT, WHETHER A REGULATORY TAKING HAS OCCURRED, PARTICULARLY IN LIGHT OF THE 1990 AMENDMENTS TO THE 1988 BEACHFRONT MANAGEMENT ACT.

If this Court is inclined to hold that the South Carolina Supreme Court was in error in its application of *Mugler* and its progeny to deny Petitioner's regulatory taking claim, it is respectfully suggested that this Court favorably consider remanding the matter with instructions in order to permit the South Carolina courts to determine whether, under relevant and time-honored considerations long endorsed by this Court, a regulatory taking did in fact occur.

The decision of the South Carolina Supreme Court is premised on the application of but one legal principle, the "*Mugler* rule." Because it held that principle to be conclusive, the state court did not consider any other factors which have traditionally been deemed of utmost importance in the determination of whether the application of a land use regulation results in a taking requiring compensation under the Takings Clause of the Fifth Amendment.[26] *See Lucas v. South Carolina Coastal Council*, 404 S.E.2d at 896.

For example, the court did not address whether the regulation, in fact, denied Petitioner "all economically viable

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[26] Even though Petitioner concedes that the appropriate tests to be applied to his claim are those enumerated in *Penn Central Transportation Co. v. New York*, 438 U.S. at 124, the tests pronounced in *Agins v. Tiburon*, 447 U.S. 255 (1980) are also referred to herein. The fact remains that regardless of which of the tests are deemed applicable to the claim under consideration, the South Carolina courts did not fully address the questions posed by either in reaching their decisions.

use,"[27] the nature and extent of Petitioner's "investment backed expectations" in the property in question[28] and the reasonableness thereof in light of the regulated nature of the shoreline land question,[29] whether Petitioner had, as a matter of state law, a recognized and protected "property interest" in the construction of any structure permitted by applicable land use regulations prior to the enactment of the Act,[30] and whether, given the 1990 amendments to the Act, there was a "taking" at all, particularly in light of this Court's admonition that "[m]ere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are 'incidents of ownership.'" *Agins v. Tiburon*, 447 U.S. 255, 263, n.8 (1980).

It is clear that should the South Carolina Supreme Court's decision be reversed, the decision of the trial court cannot stand as presently stated. The trial court awarded Petitioner compensation for a "permanent" taking. A finding of a "permanent" taking and an award of compensation,

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[27] *E.g., Nollan v. California Coastal Commission*, 483 U.S. at 834. This question is particularly perplexing and fact oriented where, as here, the use of the property pursued by Petitioner was to hold it as raw land, and hence it was a use which would have produced generated income only if there was an increase in "market value."

[28] *E.g., Penn Central Transportation Co. v. New York*, 438 U.S. at 124.

[29] Where, as is arguable here, the claimant had adequate real or constructive notice of the possibility of value depressing regulations, a fact question arises as to whether and to what extent his investment was reasonable, as opposed to speculative.

[30] *See* Section IV, *infra*. The attorney for Respondent reserved the argument that no taking has occurred as a result of his failure to apply for a permit. Jt. App., pp. 3-4, para. 16.

therefore, without offering the government the option of providing alternative relief is directly contrary to recognized law: "[o]nce a court determines that a taking has occurred, the government retains the whole range of options already available – amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. at 321. Therefore, the matter requires further proceedings of any event.

Further, with the enactment of the 1990 amendments to the Act, particularly provisions providing a means by which a permit may be issued to enable the construction of the residences Petitioner originally intended, it is clearly inappropriate to conclude that there has been a permanent taking of Petitioner's property. It is undisputed that Petitioner has not availed himself of the opportunity to determine whether the South Carolina Coastal Commission would grant him a permit to "use" his property in the manner he claims to have originally intended. Until he does so, it is necessarily impossible to determine whether the " . . . administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. at 172, 190-1 (1985). At this stage in these proceedings, considering the mandates of *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 190-1 (1985) and *MacDonald, Sommer and Frates v. County of Yolo*, 477 U.S. 340, 348, *reh'g denied*, 478 U.S. 1035 (1986), the ultimate impact of the Act on the "property rights" of Petitioner cannot be determined until such time as an administrative decision concerning the uses to be permitted is made.

Because this Court does not have the benefit of many of the factual and legal determinations regarded as necessary in considering regulatory taking claims, including whether any "taking" found is "temporary" or "permanent," a remand for consideration of the facts and circumstances pertinent to those factors would be a substantial aid in what this Court has consistently referred to as the " . . . essentially ad hoc, factual

inquiries . . . " necessary to the determination of a regulatory taking claim. *E.g., Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. at 495. *See First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. at 321-2 (case remanded to determine whether there had in fact been a taking based on a denial of "all use of . . . property for a considerable period of years").

III. A REGULATION WHICH ELIMINATES THE VALUE OF UNDEVELOPED LAND AT A GIVEN POINT IN TIME DOES NOT ESTABLISH A FIFTH AMENDMENT "TAKING" OF THAT PROPERTY.

This Court has long recognized that it

> . . . has generally "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionally concentrated on a few persons. Rather, it has examined the "taking" question by engaging in essentially ad hoc, factual inquiries that have identified several factors – such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action – that have particular significance.

Kaiser Aetna v. United States, 444 U.S. 164, 175 (1981); *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 294-296 (1981). Petitioner concedes, as he must, that these considerations are applicable to his taking claim.[31] Petitioner nonetheless advances the contention that

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[31] Petitioner's Brief on the Merits, pp. 15-16. Petitioner, nevertheless, implies that the test of "economically viable use" is pertinent here. Even if that test is applied the derivation of the term demonstrates that it should have limited applicability to the broad spectrum of factual circumstances found in "regulatory takings" cases. Making its debut as a

(Continued on following page)

where a land use regulation "eliminat[es] the value of private property [it] should be per se subject to the just compensation requirement of the Fifth Amendment." Pet. Brief on the Merits, p. 19. He, in essence, urges the adoption of the proposition that where the economic interest of the landowner is eliminated, no other considerations this Court has traditionally deemed relevant to a taking inquiry would or could apply to prevent the finding of the constitutional taking. In other words, Petitioner urges that considerations which this Court has long deemed to be relevant to the taking inquiry be deemed irrelevant if one of them, "the economic impact of the regulation," reveals that the regulation has caused the loss of all "market value" of the property involved.

(Continued from previous page)

material consideration in Fifth Amendment regulatory "taking" cases in *Agins v. Tiburon*, 447 U.S. 255, 260 (1980), it is derived from an admission made during oral argument in *Penn Central Transportation Co. v. New York City, supra*. As recited in the *Penn Central* decision, that admission was:

> The city conceded at oral argument that if appellants can demonstrate at some point in the future that circumstances have so changed that the Terminal ceases to be "economically viable," appellants may obtain relief. See Tr. of Oral Arg. 42-43.

Id., 438 U.S. at 138, p. 36. Placed in context, the term clearly applied to property which was being commercially utilized in a manner permitted under state law and utilized in a manner which was "economically viable" at the time of the imposition of the allegedly offending regulation. In other words, counsel for the City of New York admitted that if, in the future, its restrictions on the expansion of the already existing commercial use of the property caused it to "cease" being "economically viable," then Penn Central would be entitled to "relief."

It is respectfully submitted that application of that test to raw, undeveloped land – *i.e.* land which has not established any form of "economic viability" in any literal sense of that term – does nothing more than seek to maintain the land's "market value", an interest in property which in and of itself is not recognized as a constitutionally recognized property right. *See* Section III, *infra*.

Yet this Court has made it clear that, just as a legitimate exercise of the police power may result in a Fifth Amendment taking, *see, e.g., Nollan v. California Coastal Commission, supra*, "a comparison of values before and after a regulatory action is relevant," but such a comparison is " . . . *by no means conclusive*." *Keystone Bituminuous Coal Ass'n v. DeBenedictis*, 480 U.S. at 490 quoting from *Goldblatt v. Hemstead*, 369 U.S. at 594 (emphasis provided). The wisdom of that holding continues, particularly where, as here, the property alleged to have been taken has never been put to a use other than that ordinarily put to vacant land, even when other, more intense uses could have been pursued. Moreover, in making some form of "market value" test conclusive in the determination of a Fifth Amendment taking claim involving the type of land (or property interest) involved in the case now before it, this Court would permit the vicissitudes of the real estate market, undeniably fickle and entrepreneurial, to dictate with exactitude not only the compensation to be paid, but also the decision as to whether a "taking" occurred. That result,[32] we suggest, is inconsistent with established precedent, as previously cited, and is not mandated by the Fifth Amendment.

Further, this Court has also held that a taking does not necessarily occur where regulation impacts on some but not all of the "bundle of rights" which comprise the property in question. *See, e.g., Andrus v. Allard*, 444 U.S. 51, 66 (1979) (the deprivation of but one "strand," the right to convey, of a full "bundle of property rights" does not result in a taking); *Penn Central Transportation Co., supra* (deprivation of air

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[32] That this is particularly unfortunate is demonstrated by this case. With the 1990 amendments, Petitioner has the ability to obtain a permit to use the property in a manner otherwise prohibited by the Act. As a result, it is not a stretch of the imagination or common sense to conclude that Petitioner's lots, purportedly valueless at the time of trial, gained value (as yet unquantified, a fact which should be ascertained, *see* Section II, *supra*) as soon as the 1990 amendments became effective. This would be clearly the case if permits to construct have been issued to other affected landowners in similar circumstances.

rights over property not a taking where remaining rights maintained). Here, the Act prohibits construction (with certain exceptions) on Petitioner's lots. Even if the Court assumes that Petitioner's expectation of being able to construct residences on the property is a recognized property right subject to Fifth Amendment protection, this is but one "strand" in his "bundle of property rights". *See Andrus v. Allard*, 444 U.S. at 66. He has always retained the full panoply of recognized rights considered to be a part of fee simple ownership of raw land: the right to use, to exclude others, to dispose, to pass it on to his heirs, etc.[33]

Lastly, it is noteworthy that the "litmus test" that Petitioner suggests has, after all, been perfectly apparent for more than a century. It is conspicuous only by its absence in "taking" jurisprudence; it has never been adopted as the bright line beyond which a regulation may not tred without actuating the "Takings Clause" of the Fifth Amendment. It is respectfully suggested that there has been no material change in pertinent facts or law, including those applicable to property rights and interests, which might lead to the conclusion that the test Petitioner suggests would be more constitutionally palatable, indeed mandated, now than it might have been in the past.

For these reasons alone, it is respectfully suggested that this Court categorically reject such an unsupported, simplistic and over reaching application of the Taking Clause.

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[33] It is important to note that this is not a situation where loss of "all use" of land has been either assumed or proven. This Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, assuming by virtue of the pleadings below that "all use" of the property had been extinguished by the regulation in question, concluded that there would be a taking. Here, it is uncontradicted that Petitioner has retained uses, as well as the full panoply of property rights normally recognized as held by the owner of property.

A. Petitioner never possessed a constitutionally recognized "property right" in any given use of land prohibited by the Act.

Even if the Court is inclined to look favorably on Petitioner's contention, his claim suffers from a basic, and fatal, flaw: Petitioner did not have a protected property interest to construct any structure on his undeveloped land, and therefore has no property interest in the value derived therefrom. As a result, Petitioner has not suffered a compensable taking of private property under the Fifth Amendment.

Petitioner's claim requires the examination of some basic elements of taking law. The Fifth Amendment states, in pertinent part, that "private property [shall not] be taken for public use without just compensation." By virtue of the language itself, it is axiomatic that "private property" is protected against uncompensated taking for public use. Hence, in the consideration of any Fifth Amendment taking claim, the initial determination must be whether what is claimed to have been "taken" is to be deemed "private property" for which compensation may be paid. *E.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000-1 (1983); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160-1 (1980).

The scope of the term "private property" has been delineated:

> It is conceivable that (the term "property" in the Taking Clause) was used in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. The construction given the phrase has been the latter.

United States v. General Motors Corp., 323 U.S. 373, 377-378 (1945). Yet, while this Court has defined the scope of the term, it is a "basic axiom that [p]roperty interests are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules and understandings

that stem from an independent source such as state law." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 1001, *quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. at 161 (internal quotation omitted). *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). However, " . . . a mere unilateral expectation or an abstract need is not a property interest entitled to protection." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. at 161.

Applying these principles, this Court has concluded that a variety of property interests fall within the broad definition of "property" as used in the Taking Clause. *E.g., Hodel v. Irving*, 481 U.S. 704 (1987) (right to pass on property to heirs); *Armstrong v. United States*, 364 U.S. 40 (1960) (materialmen liens). Conversely, it has also concluded that certain interests are not "property" for Fifth Amendment purposes. *E.g., Bowen v. Gilliard*, 483 U.S. 587 (1987) (continuation of support payments under AFDC); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913) (no protectable interest in navigable waters).

The question thus becomes whether Petitioner has a "property interest" recognized by the Taking Clause in the uses prohibited by the Act. Simply stated, the Act as applied prohibited any (with some exceptions) "construction" on his lots. The question is therefore further refined to whether Petitioner possessed a "property right" in the ability to construct anything on his lot.[34]

There is no vested interest in the mere anticipation of a right to build. Where a permit to build is required, any prospective right to the permit prior to its issuance "is not in

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[34] Petitioner's property prior to the enactment of the Act was subject to zoning which permitted residential uses. (Transcript, p. 27). In order to engage in that use, Petitioner was required to obtain permits from the local government. (Transcript, pp. 39-40). Petitioner did not gain any form of permit to construct anything on his lots. (Transcript, pp. 39-40). With the application of the Act, Petitioner was prohibited from any construction, with some exceptions. Hence, the appropriate question is whether the application of the Act was a taking of any vested interest Petitioner may have had in the ability to construct anything on his property.

the nature of interests the deprivation of which is encompassed by the Fifth Amendment 'takings' doctrine." *Scott v. Greenville County*, 716 F.2d 1409, 1421 (4th Cir. 1983). See, *e.g., DeStefano v. City of Charleston*, 403 S.E.2d 648, 651 (S.C. 1991).

Whether a given plaintiff has a vested property right is a matter to be determined by reference to state law. *Mays-Ott Co., Inc. v. Town of Nags Head*, 751 F. Supp. 82, 84 (E.D.N.C. 1990), *citing Bd. of Regents v. Roth*, 408 U.S. 564, 578 (1972). It is evident in this context that the state of South Carolina does not recognize the concept of a vested right in a putative right to develop property absent the issuance of a permit *and* substantial expenditures in reliance thereon. *E.g., Friarsgate, Inc. v. Town of Irmo*, 290 S.C. 266, 269, 349 S.E.2d 891, 893 (S.C. Ct. App. 1986) (a zoning change that prevented development prior to substantial expenditures by the developer did not infringe upon vested rights even though the change came after issuance of the permit); *Whitfield v. Seabrook*, 259 S.C. 66, 190 S.E.2d 743 (1972) (issuance of a permit to build without subsequent expenditures did not create a vested right to be protected from subsequent zoning changes).

In the case at bar, Petitioner never obtained a permit to build. He actually never even sought one from the governmental authority. (Transcript, pp. 39-40). Under South Carolina law, therefore, he never acquired a right to construct on his lots. Consequently, the Act did not prohibit a "property right" *held by Petitioner*.

B. Petitioner had no constitutionally protected "economic interest" in any uses prohibited by the Act.

While recognizing that "economic interests" may be regarded as property subject to Fifth Amendment protection, this Court has been clear in delineating the test to determine whether an "economic interest" is to be so regarded. As held in *United States v. Willow River Power Co.*, 324 U.S. 499 (1945),

> . . . [N]ot all economic interests are "property rights"; only those economic advantages are rights

> which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion.

Id., 324 U.S. at 502. In considering the landowner's claim in that case, the Court described the process by which it was to determine whether an "economic interest" is to be considered a "property right:"

> We cannot start the process of decision by calling such a claim as we have here a "property right": whether it is a property right is really a question to be answered. Such economic uses are rights only when they are legally protected interests.

Id., 324 U.S. at 502-3.

Willow River does not stand alone. In *Kaiser Aetna v. United States, supra*, this Court considered whether Kaiser Aetna had an economic interest in a navigable pond which it created on land which was regarded as private property under state law. Quoting and applying the test enunciated in *Willow River*, the Court found that because Kaiser had improved the pond to its navigable state, and had done so on property regarded as private property under Hawaii state law, the economic interest in being able to charge for the use of the pond was protected from the United States' claim that the pond was a "navigable waterway" not subject to private control. *Id.*, 444 U.S. at 178-9.

Applying these concepts to the case at hand, it is clear that Petitioner has no protectable "economic interest" in the uses prohibited by the Act. The record reveals that the value ascribed to the property was tied inexorably to construction on the lots.[35] Yet, as demonstrated above, Petitioner has no

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[35] The testimony below was that the property was rendered valueless by virtue of the application of the Act. (Transcript, pp. 40-59). The Act prohibited any new construction on Petitioner's lots. *A priori*, if Petitioner's evidence is to be believed, the lots only have value if something (other than what the Act permitted) could be constructed on it.

constitutionally protected right in any given construction on these lots, and therefore has no right in the "value" resulting therefrom.

CONCLUSION

For all of the reasons stated herein, the American Planning Association and Tahoe Regional Planning Agency, as Amici Curiae, respectfully suggest that the decision of the South Carolina Supreme Court be affirmed or, in the alternative, be vacated and remanded for the purposes suggested herein.

Respectfully submitted,

H. Bissell Carey, III
Robinson & Cole
One Commercial Plaza
Hartford, Connecticut 06103
(203) 275-8200

Counsel of Record for Amici Curiae
American Planning Association
and Tahoe Regional Planning Agency

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No. 91-453

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

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Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of South Carolina

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BRIEF AMICUS CURIAE OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES IN SUPPORT OF RESPONDENT

JEROLD S. KAYDEN
66 Dana Street
Cambridge, MA 02138
(617) 661-3016

Of Counsel:
DAVID A. DOHENY
PAUL W. EDMONDSON
ELIZABETH S. MERRITT
NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES
1785 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 673-4035

LLOYD N. CUTLER
LOUIS R. COHEN
Counsel of Record
DAVID R. JOHNSON
JAMES R. WRATHALL
PETER B. HUTT II
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Counsel for Amicus Curiae

February 3, 1992

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BRIEF AMICUS CURIAE OF THE NATIONAL TRUST FOR HISTORIC PRESERVATION IN THE UNITED STATES IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, we file this brief as amicus curiae in support of respondent South Carolina Coastal Council. Letters of consent from counsel for the parties have been filed with the Clerk.

The National Trust for Historic Preservation in the United States ("National Trust") was chartered by Congress in 1949 as a private charitable and educational

organization to further the historic preservation policy of the United States and to "facilitate public participation in the preservation of sites, buildings, and objects of national significance or interest." 16 U.S.C. §§ 461, 468 (1988). Congress intended that the National Trust "will mobilize and coordinate public interest and participation in the preservation and interpretation of sites and buildings from voluntary resources." S. Rep. No. 1110, 81st Cong., 1st Sess. 4 (1949), *reprinted in* 1949 U.S.C.C.A.N. 2285, 2288. The National Trust has more than 250,000 individual members, including over 4,000 members who reside in the State of South Carolina, as well as some 6,600 member organizations nationwide.

The National Trust has a vital interest in securing judicial decisions that ensure the continued validity and effectiveness of regulatory protections for historic properties and regulations that otherwise serve to protect the character of America's cities, towns, and countrysides. To this end, the National Trust, through its Legal Defense Fund, maintains an active legal advocacy program to ensure the effective application of federal, state, and local laws that protect historic resources, and to uphold the constitutionality of such laws under both the U.S. Constitution and the constitutions of the various states. Since 1970, the National Trust has participated in nearly 70 cases in federal and state courts, including seven cases before this Court involving challenges to governmental regulatory authority under the Takings Clause of the Fifth Amendment.*

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* *Yee v. City of Escondido*, No. 90-1947 (argued Jan. 22, 1992); *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).

STATEMENT

In 1977, the South Carolina legislature enacted the Coastal Zone Act ("CZA"), 1977 Act No. 123 (codified at S.C. Code Ann. § 48-39-10 *et seq.* (1987) (Pet. App. 42-97)), which prohibited any new development in critical areas of the coastal zone, at that time defined as including coastal waters, tidelands, beaches, and primary ocean front sand dunes. *Id.* § 48-39-10(J) (Pet. App. 45). The CZA prohibited development in the area beyond the "front row of dunes adjacent to the Atlantic Ocean." *Id.* § 48-39-10(J) (Pet. App. 45).[1] In 1986, petitioner, a developer with extensive experience with coastal properties, purchased two beachfront lots that were zoned for construction of single family homes.

In 1988, South Carolina enacted the Beachfront Management Act (the "BMA"), in part to prevent erosion of coastal areas found to be necessary to "protect[] life and property by serving as a storm barrier." Beachfront Management Act, 1988 Act No. 634 § 4 (codified at S.C. Code Ann. § 48-39-250(1)(a) (Pet. App. 98)). To accomplish this goal, the BMA enlarged the critical area defined by the CZA to a setback line to be established "utilizing the best available scientific and historical data." *Id.* § 48-39-280(A) (Pet. App. 110). The South Carolina

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[1] The CZA was enacted pursuant to the requirements of the federal Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-1464 (1988) ("CZMA"), thereby allowing residents of South Carolina to enjoy the benefits of federal grants and flood insurance. One of the primary national policies of the federal CZMA is "the management of coastal development to minimize the loss of life and property caused by improper development in flood-prone, storm surge, geological hazard, and erosion-prone areas . . . and by the destruction of natural features such as beaches, dunes, wetlands, and barrier islands." *Id.* § 1452(2)(b). To accomplish this and other goals, the CZMA requires participating states to implement programs for protection of coastal resources which, among other things, define "what shall constitute permissible land uses . . . within the coastal zone." *Id.* § 1454(b)(2).

Coastal Council ("SCCC"), the state agency charged with implementing and enforcing the BMA, established a new setback line along the coast that was behind the landward border of petitioner's property, thereby prohibiting any new construction on petitioner's property. Petitioner filed suit in the South Carolina Court of Common Pleas seeking compensation under the Fifth and Fourteenth amendments to the U.S. Constitution (and corresponding state constitutional provisions) equal to the value of his property, which he claimed had been "taken" by the BMA.[2] The South Carolina Supreme Court held that no taking had occurred.

SUMMARY OF ARGUMENT

In 1986, petitioner purchased two lots on a barrier island on the South Carolina coast. The "land" comprising petitioner's lots has been entirely under water at times within the last 40 years. In 1988, the South Carolina legislature, finding that the coastal beach/dune system "protects life and property" and that construction "has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property and development in coastal areas," enacted the Beachfront Management Act, which prohibited future coastal development seaward of setback lines to be established, "utilizing the best available scientific and historical data," landward of recent high water marks. The setback line thereafter established is landward of petitioner's lots.

Petitioner concedes "the public wisdom of the South Carolina Act" (Br. 10) and does not challenge the wisdom of placing the setback line landward of his property. His *only* contention is that since the BMA deprives his

[2] In 1990, South Carolina enacted amendments to the BMA authorizing the SCCC to issue a "special permit" to build structures otherwise prohibited if certain criteria are met. S.C. Code Ann. § 48-39-290(D) (Pet. App. 125-26). Petitioner has not sought such a permit under the 1990 amendments.

property of all economic use, it effects a compensable taking, regardless of the nature, validity, or strength of the interest served by the BMA.[3]

I. This Court first held more than a century ago in *Mugler v. Kansas*, 123 U.S. 623 (1887), that a state may, without paying compensation, prohibit uses of property that cause serious harm to persons or other property. The principle that ownership of property does not include the right to use it in ways that harm others is of ancient vintage, is firmly established in the Court's takings cases, and has never been seriously questioned.

The uses of property that cause serious harm to others are not limited to a fixed and finite list. To the contrary, whether a use is harmful may depend upon current scientific knowledge and on the physical context of the property ("a nuisance may be merely a right thing in the wrong place,—like a pig in a parlor instead of the barnyard"). A use may *become* or *be discovered to be* harmful, and whether a use causes serious harm is often a subject for legislative determination. Previously acceptable uses of property may subsequently be determined to pose a threat of serious harm, as illustrated by

[3] As the Solicitor General has pointed out (U.S. Br. 9-12), petitioner's claim of a "permanent" taking cannot be maintained in light of the 1990 amendments to the BMA, authorizing construction with a special permit for which petitioner has not yet applied. At most, petitioner would have a claim for compensation for any damages incurred in the interval between adoption of the BMA and the 1990 amendment. Such a claim would present both legal and factual issues that the South Carolina courts have had no occasion to consider. These would include (i) whether petiitoner suffered any injury at all during a period for which he has not attempted to prove any plan for use, and (ii) whether the legislature could call a temporary halt to escalating development on protective beaches while it developed a permitting system, without imposing any form of taking even on a landowner ultimately held entitled to a permit. Rather than decide important constitutional issues in such an inappropriate context, the Court may prefer to allow petitioner the opportunity to apply for a permit and then pursue any remaining taking claim.

the Court's decisions in *Mugler*, *Hadacheck*, *Reinman*, and *Schoene*. And a use may be harmful, and subject to prohibition under the *Mugler* principle, if engaged in by a large number of property owners, even where a single instance of that use might not be seriously harmful.

The right of a state to bar uses of property that threaten serious harm to others, without paying compensation, is not limited to cases where there is some permissible economically viable use of the property. To the contrary, it is based on the principle that a property owner does not "own" the right to harm others. The *Mugler* Court expressly assumed that the regulated breweries might "become of no value as property," and none of the Court's several decisions based on the *Mugler* principle has suggested that an alternative economically viable use must be available.

II. The South Carolina legislature determined that additional construction in the restricted areas would jeopardize the beach/dune system that protects life and property. A court hearing a taking claim defended on *Mugler* grounds should determine whether the statute or regulation at issue substantially advances the goal of preventing serious harm to others. Here, based in part on petitioner's concession, the South Carolina Supreme Court found that "discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm." This Court should affirm on the ground that the state court properly accepted petitioner's concession and then properly applied the *Mugler* principle.

Even if petitioner had not conceded the point, there was ample basis for the conclusion of the South Carolina legislature and the court below that barring further construction on the restricted property was necessary to prevent serious harm. Congress has recognized in the Coastal Zone Management Act that destruction of "beaches, dunes, wetlands, and barrier islands" causes

"loss of life and property." The coast in question is visited by storms—most recently, Hurricane Hugo—that take lives and cause devastating property losses. There is abundant scientific basis for the South Carolina legislature's conclusion (with which other coastal states agree) that barrier beaches, dunes, and islands, all important buffers against such storms, cannot be preserved by artificial barriers and are weakened and destroyed by new construction.

Petitioner does not contend that it was inappropriate to draw the setback line landward of his property, which has been under water within recent memory. Certain amici point out that other landowners were allowed to develop property prior to the imposition of the setback line. But the legislature had the authority, when it learned that traditional erosion control devices were counterproductive, to bar further construction without requiring demolition of existing structures.

III. Certain amici suggest that *any* restriction on the use of property, unless justified by the need to prevent serious harm to others, is a taking, regardless of the extent of the deprivation of use in question. This suggestion is irrelevant to this case, which does involve serious public harm and a denial of all economic use of petitioner's property. But the suggestion is also seriously wrong. The Court has repeatedly recognized that otherwise valid regulation may substantially reduce the value of property, and it has *never* found a regulatory taking where economically viable uses of the property remain.

ARGUMENT

Petitioner's only argument is that *every* regulation that denies a property owner "economically viable use" of his property effects a taking. (Br. 19.) We show in Part I that a regulation barring uses of property that threaten serious harm to others does not effect a taking, even if the prohibited uses are the only economically viable uses of the property. We show in Part II that the South Carolina Supreme Court properly accepted the findings of the state legislature that the building of additional structures on certain Atlantic beachfront property threatened serious harm to persons and other property. In Part III, we show, in response to the arguments of certain amici on an issue not presented in this case, that an otherwise proper regulation that does *not* eliminate all economically viable use of a parcel of property cannot be deemed to effect a taking.

I. A REGULATION BARRING USES OF PROPERTY THAT THREATEN SERIOUS HARM TO OTHERS DOES NOT EFFECT A TAKING, EVEN IF THE PROHIBITED USES ARE THE ONLY ECONOMICALLY VIABLE USES OF THE PROPERTY

A. This Court Has Long Recognized That a State May Prohibit Uses of Property That Threaten Serious Harm to Others Without Paying Compensation

More than a century ago, this Court made it crystal clear that a state may, without paying compensation, prohibit uses of property injurious to public health, safety, or welfare:

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property . . . . The power which the States have of prohibiting such use . . . is not—and, consistently with the existence and

> safety of organized society, cannot be—burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted . . . to inflict injury upon the community.

Mugler v. Kansas, 123 U.S. 623, 668-69 (1887). On this basis, the Court upheld an ordinance effectively prohibiting operation of a previously lawful brewery, although the ordinance "operated to destroy the business of the company, and seriously to impair the value of its property." *Id.* at 668.[4]

Applying the *Mugler* principle, the Court has repeatedly sustained uncompensated prohibitions of harmful uses of property. *See Reinman v. City of Little Rock*, 237 U.S. 171 (1915) (law prohibiting operation of livery stables in downtown area); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (law prohibiting operation of brick yard and kiln in residential area); *Miller v. Schoene*, 276 U.S. 272 (1928) (law requiring destruction of cedar trees because they harbored a disease harmful to apple trees); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (law restricting dredging and pit excavating in residen-

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[4] Petitioner and certain amici suggest that *Mugler* was decided under the Due Process Clause of the Fourteenth Amendment instead of the Takings Clause, and is therefore inapplicable here. *E.g.*, Br. 12-13; Brief Amicus Curiae of Pacific Legal Foundation 18-20. But the Court was explicitly responding to the contention that the ordinance "is, in effect, a taking of property for public use without compensation." *Mugler*, 123 U.S. at 664. Any suggestion that *Mugler* was overruled by *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), is meritless. The decision in *Pennsylvania Coal* turned on the fact that "the public interest is shown by the statute to be limited" and the statute was "not justified as a protection of personal safety." *Id.* at 414. Justice Holmes, who wrote for the Court in *Pennsylvania Coal*, plainly did not believe it had overruled *Mugler*, because he later joined the Court's opinion in *Miller v. Schoene*, 276 U.S. 272 (1928), upholding on the basis of *Mugler* the uncompensated destruction of cedar trees to prevent cedar rust from infecting more valuable apple trees nearby.

tial area).[5] Most recently, the Court sustained the power of a state to prevent owners of coal property from removing coal that supported surface structures, without paying compensation, on the ground that the regulation was designed to "prevent[] activities similar to public nuisances." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493 (1987).[6]

Even dissenters to the application of the *Mugler* principle in specific cases have acknowledged the overall validity of the principle. For example, Chief Justice Rehnquist observed in dissent in *Keystone* that government has "unquestioned authority to prevent a property owner from using his property to injure others without having to compensate the value of the forbidden use." 480 U.S. at 511. *See also Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 144 (1978) (Rehnquist, J., dissenting) (recognizing the principle that "government can prevent a property owner from using his property to injure others without having to compensate the owner for the value of the forbidden use"); *id.* at 145 ("the question is whether the forbidden use is dangerous to the safety, health, or welfare of others"); *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895, 906 (S.C. 1991) (Harwell, J., dissenting) (some "regulations may provide for the prevention of a nuisance and as such will not require compensation to an affected landowner").

The *Mugler* principle applies to uses of property that cause serious harm to others—uses that violate the

[5] *See also United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958) (law requiring closure of gold mine).

[6] The *Keystone* Court noted that state courts have consistently upheld laws banning "nuisance-like activities" without payment of compensation. *See* 480 U.S. at 492 n.22 (citing, *e.g.*, *Nassr v. Commonwealth*, 477 N.E.2d 987 (Mass. 1985) (hazardous waste operation); *MacLeod v. Takoma Park*, 263 A.2d 581 (Md. 1970) (unsafe building); *Eno v. Burlington*, 209 A.2d 499 (Vt. 1965) (fire and health hazard)).

maxim *sic utere tuo ut alienum non laedas* ("use your property so as not to injure another's"). But while the maxim is ancient, the class of harmful uses must obviously be defined contemporaneously by the property's physical context and by current scientific knowledge. This Court has explicitly recognized that the *Mugler* principle is not confined to common law "nuisances."[7] And the Court has expressly recognized, in Justice Sutherland's memorable words, that "a nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926). Use of land for a brickyard (*Hadacheck*), for a livery stable (*Reinman*), or to grow cedar trees (*Schoene*) is not inherently harmful, any more than building a house is inherently harmful. But in particular physical contexts, each of these uses, including building a house, may be harmful—a

[7] *See Miller v. Schoene*, 276 U.S. at 280 ("We need not weigh with nicety the question whether the infected cedars constitute a nuisance . . . ."); *accord Goldblatt v. Hempstead*, 369 U.S. 590, 593 (1962); *Reinman v. City of Little Rock*, 237 U.S. 171, 176 (1915). The category of seriously harmful uses evolves over time and is obviously subject to legislative definition. For example, although air or water pollution that harms a neighbor has been deemed a nuisance for centuries, *see, e.g.*, *William Aldred's Case*, 77 Eng. Rep. 816 (K.B. 1611) (enjoining and awarding damages for a nuisance created by odors from a hog sty); *Beach v. Sterling Iron & Zinc Co.*, 33 Atl. 286, 291-93 (1895) (enjoining as a nuisance the dumping of clay extracted from a mining operation into the river upstream of plaintiff's property), *aff'd*, 41 Atl. 1117 (N.J. 1896), greater understanding of the severity of the pollution threat has resulted in comprehensive, detailed federal statutes regulating its sources, such as the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1988), the Clean Air Act, 42 U.S.C. §§ 7401-7642 (1988), and the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992 (1988). The Court has recognized that these regulatory programs have both evolved from and displaced the historic theories of nuisance. *See City of Milwaukee v. Illinois*, 451 U.S. 304 (1981) (Federal Water Pollution Control Act displaced federal common law of nuisance).

substantial intrusion upon the safe and beneficial use and enjoyment of other property.[8]

It is equally clear that a particular use of property can *become* a harmful use (and, a fortiori, that a use can be discovered to be a harmful use) after the property is acquired by a particular owner. The brick kiln in *Hadacheck* became harmful when a residential neighborhood grew up around it. *See Hadacheck*, 239 U.S. at 405, 410-11. The owner of coal lands discovered to contain poisonous gases could surely be barred, without compensation, from mining that would release the gases. *Cf. Pennsylvania Coal*, 260 U.S. at 418 (Brandeis, J., dissenting). While such a landowner would have suffered a misfortune that might command public sympathy, the public would not be the *cause* of that misfortune, and an uncompensated prohibition against such mining, while undoubtedly a burden, would not be an "unfair" burden to impose.

Petitioner suggests that it is inherently "unfair" to bar a use of property that had hitherto been acceptable. But if changing circumstances or new scientific knowledge about the harm caused by a prohibited activity are the source of the new restriction, it is not "unfair" to modify the laws accordingly. Indeed, the *Mugler* Court itself recognized that a legislature may enact new prohibitions based on evolving knowledge and evolving perceptions of harm:

> It is true, that, when the defendants in these cases purchased or erected their breweries, the laws of the

[8] Some amici suggest that the right to build a house is so fundamental that its prevention, without more, gives rise to a claim for compensation. *E.g.*, Brief of Washington Legal Foundation, et al., as Amici Curiae 18-20. But there is no such doctrine. House construction is of course usually a non-harmful use, but there is no "inherent" right to build a house in an area where, because of unusual conditions, such construction threatens serious harm to life and other property.

> State did not forbid the manufacture of intoxicating liquors. But the State did not thereby give any assurance, or come under an obligation, that its legislation upon that subject would remain unchanged. . . . [T]he supervision of the public health and the public morals is a governmental power, "continuing in its nature," and "to be dealt with as the special exigencies of the moment may require;" and that, "for this purpose, the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself."

Mugler, 123 U.S. at 669 (quoting *Stone v. Mississippi*, 101 U.S. 814 (1879)). *See also Keystone*, 480 U.S. at 488 ("circumstances may so change in time . . . as to clothe with such a [public] interest what at other times . . . would be a matter of purely private concern") (quoting *Block v. Hirsh*, 256 U.S. 135, 155 (1921)); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386-87 (1926).

Finally, a legislature may prohibit, on the *Mugler* principle, a class of use that collectively threatens serious harm to the public, even though a single instance of such use might not be seriously harmful. If placement of a number of houses on an oceanfront bluff would be likely to cause erosion, loss of the bluff, and resulting damage to landward property, a state may surely prohibit all such houses, without paying compensation, even if building the first house alone would not cause serious harm. And if it were discovered *after* the building of the first house that building a number of additional houses would threaten serious damage, the legislature could call a halt at that point, again without paying compensation to the owners denied the right to do what their neighbors had done.[9] The prohibition would be sub-

[9] Certain amici object that the restricted landowner enjoys no "reciprocal advantage" if he is wholly barred from building. But barring a harmful use of property does not require any such direct reciprocity: the property owners in *Mugler*, *Hadacheck*, and *Schoene*

ject to examination to determine whether it does indeed substantially advance the goal of preventing a serious public harm, but if the prohibition passes that test, it rests squarely on the *Mugler* principle and, indeed, on a principle as old as the law of property.

B. The Principle That a State May Bar Uses of Property That Threaten Serious Harm Remains Applicable Even if the Barred Uses Are the Only Economically Viable Uses of the Property

Petitioner contends that the *Mugler* principle ceases to apply where the barred use is the only valuable use of the property; where this is the case, he argues, the state must always pay compensation. (Br. 19-35.) But that contention, which is rejected by certain of his amici (*see* U.S. Br. 13-17; Brief of the Institute for Justice 20), is consistent neither with logic nor with precedent.

First, petitioner misses the point of the *Mugler* principle. While the principle has occasionally been referred to as a "nuisance exception" to the law of takings, it rests on the basic proposition that property rights do not encompass the right to harm others. No state's law defines "private property" to include a right to engage in activity that threatens harm to the public.[10] As this Court recognized in *Keystone*, "Since no individual has a right to use his property so as to create a nuisance or otherwise harm others, the State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity." *Keystone*, 480 U.S. at 491 n.20.[11] "'[A]ll property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community,'" *id.* at 491-92 (quoting *Mugler*, 123 U.S. at 665), and enforcement of that obligation does not trigger a right to compensation. *Id.*

Second, this Court's precedents are wholly inconsistent with the notion that there is a right to *some* economically viable use of property that trumps the government's right to bar harmful uses without compensation. In *Mugler* itself, the Court assumed as one possibility that the brewery buildings lacked any other use, and that "such establishments will become of *no* value as property." 123 U.S. at 664 (emphasis added). The Court did not suggest that the right to prohibit brewing activities without paying compensation turned on the availability of some residual valuable use. The majority in *Pennsylvania Coal* did not dispute Justice Brandeis's reading of the earlier cases as establishing that no such residual valuable use is necessary: "Restriction upon [harmful] use does not become inappropriate as a means, merely because it deprives the owner of the only use to which the property can then be profitably put." 260 U.S. at 418 (citing, *e.g.*, *Mugler*, *Powell v. Pennsylvania*, 127 U.S. 678 (1888), and *Hadacheck*).[12] No decision of this Court

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enjoyed no advantage from the regulations at issue. *See Pennsylvania Coal*, 260 U.S. at 422 (Brandeis, J., dissenting); *see also Keystone*, 480 U.S. at 491 & n.21.

[10] As noted by Chief Justice Rehnquist in his dissent in *Keystone*, "'Property interests are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *Id.* at 519 (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) and *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

[11] Economists would refer to uses of property that impose harm on others as creating "externalities," costs that are not borne by the owner of the land. A regulation addressing such externalities by restricting a harmful use, where the harm is greater than the benefit otherwise reasonably expected to be realized from the proposed use of the property, merely corrects this situation by taking into account *all* of the costs associated with his use.

[12] The Court has also held that owners whose real property is wholly destroyed to prevent the spread of a fire, *see Bowditch v. Boston*, 101 U.S. 16, 18-19 (1879), or whose personal property is wholly destroyed to prevent the spread of disease, *see Sligh v. Kirkwood*, 237 U.S. 52, 59-60 (1915), are not entitled to compensation.

has suggested that an alternative economic use of property *must* be available when a harmful use of property is prohibited.[13]

There are obvious circumstances in which a legislature must be able to prevent harm by depriving an owner of all economically viable use without triggering any claim for compensation—circumstances in which the regulation, although it eliminates all economic use, would not bar anything the owner had a right to do. The Solicitor General suggests (U.S. Br. 14) a building safety code regulation, enforceable without compensation even against property on which it renders construction economically infeasible. Similarly, a regulation adopted in response to a newly discovered threat to safety (such as a geological fault or a flood threat created by a forest fire's destruction of neighboring trees) would be valid notwithstanding its impact on prior expectations. For example, if scientific advances allowed accurate prediction that a particular area of Washington State was likely to suffer a serious earthquake or volcanic eruption, surely the

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[13] In *Miller v. Schoene*, in the course of demonstrating that apple trees are more valuable than red cedar trees, the Court noted in passing that red cedar has "occasional use and value as lumber." 276 U.S. at 279. But the Court did not discuss whether the timber owned by the petitioner in that case was commercially saleable, and nothing in the opinion remotely suggests that the state's right to require uncompensated felling of the trees depended on any such salvage value. To the contrary, it is perfectly clear from its unanimous opinion that the *Schoene* Court would have sustained a law requiring the *burning* of cedar trees if that had been necessary to protect apple trees in which there was a public interest: the Court spoke of preferment of the public interest over the property interest of the individual, "to the extent even of its destruction." *Id.* at 280. The Court's discussion of *Schoene* in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 126 (1978), mentions the owner's right "to use the felled trees" but does not suggest that *Schoene* turned on that point. *But cf. Keystone*, 480 U.S. at 513 (Rehnquist, C.J., dissenting).

State could bar all new construction in this area. The discovery of a new offshoot of the San Andreas fault or of new rumblings within Mt. St. Helen's could create misfortune, but regulations reasonably responsive to such threats would not require compensation. The issue in the present case, to which we now turn, is whether the BMA, as applied to petitioner, substantially advances a legitimate state interest in preventing serious harm.

II. THE SOUTH CAROLINA SUPREME COURT PROPERLY ACCEPTED THE FINDING OF THE SOUTH CAROLINA LEGISLATURE THAT BUILDING ADDITIONAL STRUCTURES ON COASTAL PROPERTY THREATENED SERIOUS HARM

The South Carolina legislature expressly found, in enacting the BMA, that the prohibited building activities would cause serious harm to others. The BMA declares that the beach/dune system "protects life and property by serving as a storm barrier which dissipates wave energy and contributes to shoreline stability in an economical and effective manner." S.C. Code Ann. § 48-39-250(1)(a) (Pet. App. 98). It further declares that unwise development "has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property." *Id.* § 48-39-250(4) (Pet. App. 99). Explaining the means chosen to effectuate its purposes, the legislature stated in the BMA that the

> use of armoring in the form of hard erosion control devices such as seawalls, bulkheads, and rip-rap to protect erosion-threatened structures adjacent to the beach has not proven effective. These armoring devices have given a false sense of security to beach front property owners. In reality, these hard structures, in many instances, have increased the vulnerability of beach front property to damage from wind and waves . . . .

Id. § 48-39-250(5) (Pet. App. 99). In sum, the legislature found that "Erosion is a natural process which be-

comes a significant problem for man only when structures are erected in close proximity to the beach/dune system." *Id.* § 48-39-250(6) (Pet. App. 99-100). It therefore acted "to arrest what it perceive[d] to be a significant threat to the common welfare." *Keystone*, 480 U.S. at 485.

Petitioner conceded in the South Carolina courts (as he does in this Court) "the public wisdom of the South Carolina Act" (Br. 10), and he declined to litigate any issue concerning the BMA's purposes or the appropriateness of the setback lines as applied to his property. To the contrary, he argues *only* that the *Mugler* principle either has not survived or cannot be applied to any case where a regulation, however valid, leaves no economically viable use of property. The South Carolina Supreme Court, accordingly, understood petitioner not to contest the state's position that "discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm" (Pet. App. 8) and "to prevent serious injury to the community." (*Id.* at 15.) It considered itself "bound by these uncontested legislative findings . . . . [in the absence of] any attack whatsoever on the statutory scheme . . . ." (*Id.* at 8-9.) The state court correctly rejected petitioner's contention that the *Mugler* principle could have no possible application to this case and then, quite logically given petitioner's position, treated *Mugler* as dispositive.

Absent any challenge from petitioner, it was entirely proper for the South Carolina Supreme Court to accept the legislature's findings at face value. If petitioner wished to argue (as some amici do in this Court) that the threatened harm was not sufficiently serious to make building a house in a particular location a "harmful" use, or that the threat was not supported by sufficient findings, or that it is not clear whether the legislature was actually motivated by the threat of hurricane damage to coastal areas, the place to have made those arguments was in the South Carolina courts. When petitioner chose instead to rely solely on the argument that *Mugler* can-

not apply to him because he lost all economically viable use of his land, the state court was justified in assuming that the legislature was seeking in good faith "to arrest . . . a significant threat to the common welfare." *Keystone*, 480 U.S. at 485.

This Court should therefore affirm the South Carolina court's decision on the ground that the *Mugler* principle remains valid and is applicable even where all economically viable use of property is eliminated, and that the state court was entitled to accept the unchallenged findings of its legislature that make the *Mugler* principle applicable here.

But even if petitioner had challenged the legislature's findings, there was ample basis for the South Carolina court to determine that the BMA substantially advances a state interest in preventing serious harm. In scrutinizing a statute claimed to effect a taking, a court must of course "examine the operative provisions of a statute, not just its stated purpose, in assessing its true nature." *Keystone*, 480 U.S. at 487 n.16. But the BMA easily withstands such scrutiny, for there was substantial basis for the South Carolina legislature's finding that construction of additional buildings seaward of a line drawn utilizing "the best available scientific and historical data," S.C. Code Ann. § 48-39-280(A) (Pet. App. 110), would threaten serious harm to people and property.

In the federal Coastal Zone Management Act, pursuant to which the state BMA was enacted, Congress itself recognized the threat of "loss of life and property caused by . . . the destruction of natural protective features such as beaches, dunes, wetlands, and barrier islands." 16 U.S.C. § 1452(2)(B) (1988). The threat of harm is certainly real: hurricanes, other storms, and ocean waves and flooding take large numbers of lives and cause extensive property damage,[14] and South Carolina knows this well. Hurricane Hugo, buffeting the South Carolina

[14] *See, e.g.*, W. Kaufman & O. Pilkey, *The Beaches Are Moving* 128-32 (1983).

coast, took 29 lives in that state and inflicted devastating damage on Charleston, one of America's most beautiful and historic cities.[15] Oceanfront development in storm areas poses a direct threat to property owners themselves, to storm rescue teams, and to landward property owners threatened by storm-created debris. Such development also leads to the loss of barrier beaches and barrier islands (like the Isle of Palms on which petitioner's property is situated) through erosion, loss of vegetation, and failure to accrete additional sand.[16] Barrier beaches up and down a coastline protect populated areas. Thus, while the wide beach and dune area buffer zone presently found on the Isle of Palms helped to protect some of its houses from destruction by Hurricane Hugo, other beaches subjected to long-term erosion were devastated by the storm.[17] The South Carolina legislature was thus fully justified in determining that landowners who build structures on barrier beaches are using their property in a way that threatens concrete and serious harm to the lives and property of others.[18]

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[15] *See* Comment, *Shifting Sands and Shifting Doctrines: The Supreme Court's Changing Takings Doctrine and South Carolina's Coastal Zone Statute*, 79 Cal. L. Rev. 205, 213 (1991). As a result of Hurricane Hugo alone, the federal government has made payments of $1.024 billion in aid to South Carolina. *Id.* at 215.

[16] *See generally* I. McHarg, *Design With Nature* 7-13 (1969); *Managing Coastal Erosion: Report of the National Research Council* 23 (1990); W. Kaufman & O. Pilkey, *supra* note 14, at 109.

[17] *See Managing Coastal Erosion*, *supra* note 16, at 166.

[18] Several other states have adopted similar legislation. *See* Comment, *supra* note 15, at 216-18 & nn.46-48 (citing state statutes). The Florida legislature found when enacting its Beach and Shore Preservation Act that "imprudent construction . . . can jeopardize the stability of the beach-dune system, accelerate erosion, provide inadequate protection of upland structures and endanger adjacent properties." Fla. Stat. Ann. § 161.053(1) (West 1984).

The South Carolina legislature also referred to the threat of environmental damage. Certain amici assert that this is not a serious public harm within the *Mugler* principle. But Congress has certainly concluded otherwise. *See, e.g.*, Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1988); Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. §§ 1401-1445 (1988); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370b (1988); Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (1988); Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901-6992 (1988); Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387 (1988); Clean Air Act, 42 U.S.C. §§ 7401-7642 (1988).

Finally, petitioner has never suggested, nor could he, that it is inappropriate to apply the BMA to his specific property. To the contrary, petitioner must acknowledge that his property has been under water during the last forty years. (*See* J.A. 9.) The SCCC's drawing of the setback line to include his property was entirely reasonable. To be sure, landowners who had developed their beachfront property prior to imposition of the setback line were less severely affected by implementation of the BMA,[19] but the legislature's evolving understanding (reflected in the statutory findings) that traditional erosion control devices are counterproductive permitted it to bar new building without requiring demolition of existing structures.[20]

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[19] Such landowners are subject to restrictions on rebuilding any structures that are destroyed in the future. S.C. Code Ann. § 48-39-290(B)(1) (Pet. App. 117-19).

[20] The SCCC might also have been able to show that petitioner, an experienced developer, took a deliberate gamble—that in 1986 he could have anticipated the possibility of further restrictions to protect a sensitive area but chose to take that risk. *Cf. Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

Indeed, if after petitioner's purchase the beach had eroded (as, historically, it had) so that petitioner's property was on the wrong side of the first line of dunes, then the prior statute, based on the previous public understanding of the nature of the erosion risk, would itself have prohibited all construction—yet the loss of that "right to build" would not have been compensable. As it happened, what shifted was not the beach but the public understanding of the nature and severity of the risk of erosion. Petitioner lost his gamble because of the nature of his property, as that nature came to be known, not because of a capricious decision on the part of any legislature.

III. AN OTHERWISE PROPER REGULATION, NOT INVOLVING A PERMANENT PHYSICAL OCCUPATION, CANNOT EFFECT A TAKING UNLESS IT DENIES ALL ECONOMICALLY VIABLE USE OF PROPERTY

Various amici suggest that *any* restriction on the use of property, unless justified by the need to prevent serious harm to others, effects a taking, even if the restriction does not eliminate all economically viable use of the property. According to one, "The proper rule is thus one of strict proportion: the greater the taking, the greater the restriction, then the greater the compensation that must be paid." Brief of Institute for Justice as Amicus Curiae 13; *see also* Brief of Amicus Curiae The Nemours Foundation, Inc. 11-12. These suggestions are not pertinent to this case, which involves a restriction that is intended to prevent serious harm and apparently denies all economic use of petitioner's parcels. But the suggestion is also seriously wrong.

As Justice Holmes said in the case that is the fountainhead of this Court's regulatory takings jurisprudence, "Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). Over and over since then, the Court has recognized that governments may adopt measures that substantially adjust the burdens and benefits of economic life and reduce the value of property without effecting a compensable taking. In *Hodel v. Irving*, 481 U.S. 704, 713 (1987), for example, the Court noted that "the Government has considerable latitude in regulating property rights in ways that may adversely affect the owners." In *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978), the Court affirmed that "government may execute laws or programs that adversely affect recognized economic values." And the Court has repeatedly stated that a regulation reducing the value of property "does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'" *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987) (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

Indeed, the Court has never found a regulatory "taking" based on the quantum of value the owner has lost unless the owner has been deprived of all economic use of a properly defined parcel of property.[21] For example, in *Pennsylvania Coal*, the Court found that the regulation went "too far" because, inter alia, it eliminated all value of the coal in question: "To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it. This we think that we are warranted in assuming that the statute does." 260 U.S. at 414-15. In *Armstrong v. United States*, 364 U.S. 40 (1960), the Court found a taking where the government completely destroyed materialmen's liens against ships. Although it relied on other considerations as well, the Court clearly stated: "Before the liens were destroyed, the lienholders admittedly had compensable property. Immediately afterwards, they had none." *Id.* at 48. In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), the Court found that a regulation authorizing EPA to disclose data submitted confidentially by plaintiffs effected a taking, because it would utterly destroy the "economic value" of the data. *Id.* at 1011-12.

By contrast, this Court has *never* found a regulatory taking where economically viable uses of property remain. In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926), the Court upheld a law imposing a 75 percent diminution in value. In *Andrus v. Allard*, 444 U.S.

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[21] Petitioner concedes (Br. 10) that the present case does not involve a permanent physical occupation.

51, 66-68 (1979), the Court upheld against a taking challenge a statute limiting the sale of eagle feathers, though the feather owners' ability to derive economic benefit was drastically reduced by the statute. *See also Penn Central*, 438 U.S. at 104 (regulation denying right to exploit valuable air rights did not effect taking).

Virtually every regulation of economic life has the effect of denying some property a portion of its value. Since 1922, the Court has recognized that the question whether a regulation affecting the use of private property "goes too far" and effects a taking "cannot be disposed of by general propositions." *Pennsylvania Coal*, 260 U.S. at 415, 416. The answer is given not by any bright-line test but by a combination of factors: "the economic impact of the regulation on the claimant," "the extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the government action." *Penn Central*, 438 U.S. at 124. The result of applying these factors in a given case may well be to reduce a property's value without compensation to the owner. But such an owner shares in the advantage derived by everyone from the capacity of our elected legislatures to regulate the uses of property even when regulation reduces value; it is "the advantage of living and doing business in a civilized community." *Ruckelshaus v. Monsanto Co.*, 467 U.S. at 1007.

CONCLUSION

The decision of the Supreme Court of South Carolina should be affirmed.

Respectfully submitted,

JEROLD S. KAYDEN
66 Dana Street
Cambridge, MA 02138
(617) 661-3016

Of Counsel:
DAVID A. DOHENY
PAUL W. EDMONDSON
ELIZABETH S. MERRITT
NATIONAL TRUST FOR
HISTORIC PRESERVATION
IN THE UNITED STATES
1785 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 673-4035

LLOYD N. CUTLER
LOUIS R. COHEN
Counsel of Record
DAVID R. JOHNSON
JAMES R. WRATHALL
PETER B. HUTT II
WILMER, CUTLER &
PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

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Counsel for Amicus Curiae

(31)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DAVID H. LUCAS,

Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF OF THE U.S. CONFERENCE OF MAYORS, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

BABRARA E. ETKIND
CHARLES T. BLAIR
SETH D. BERLIN
ROSS, DIXON & MASBACK
601 Pennsylvania Ave., N.W.
North Building
Washington, D.C. 20004
(202) 662-2000

J. PETER BYRNE
GEORGETOWN UNIVERSITY
LAW CENTER
600 New Jersey Ave., N.W.
Washington, D.C. 20001
Of Counsel

RICHARD RUDA *
Chief Counsel
MICHAEL G. DZIALO
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 638-1445
* *Counsel of Record for the* Amici Curiae

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QUESTION PRESENTED

Whether principles of "justice and fairness" require this Court to reverse the decision of the Supreme Court of South Carolina and find a compensable taking of petitioner's property under that State's Beachfront Management Act solely because of the property's diminution in value and without regard to the compelling public safety rationale for the legislation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-453

DAVID H. LUCAS,

Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF OF THE U.S. CONFERENCE OF MAYORS, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States. *Amici* and their members have a vital interest in the legal issues that affect the powers and responsibilities of state and local governments to regulate land use in the public interest.

All states and local governments regulate land use. To give just one pertinent example, following enactment in 1972 of the Coastal Zone Management Act, 16 U.S.C.A. §§ 1451-1464 (West 1985 & Supp. 1991), every coastal State passed legislation designed to protect its shoreline from the hazards resulting from overdevelopment.[1] Many

[1] *See* Ala. Code §§ 9-7-10 to 9-7-20 (1987) ("Preservation, Development, Etc. of Coastal Areas"); Alaska Stat. §§ 46.40.10-46.40.210 (1991) ("The Alaska Coastal Management Program"); Cal. Pub. Res. Code §§ 30000-30900 (West 1986 & Supp. 1991) ("The California Coastal Act of 1976"); Conn. Gen. Stat. Ann. §§ 22a-90 to 22a-113j (West 1985 & Supp. 1991) ("The Coastal Management Act"); *id.* §§ 25-69 to 25-102 ("Flood Control and Beach Erosion") Del. Code Ann. tit. 7, §§ 7001-7013 (1991) ("Coastal Zone Act") *id.* 6801-6812 ("Beach Preservation"); Fla. Stat. Ann. §§ 161.001-161.58 ("Beach and Shore Preservation Act"); *id.* §§ 380.19-380.28 (West 1988 & Supp. 1991) ("Florida Coastal Planning and Management Act of 1978"); Ga. Code Ann. §§ 12-5-210 to 12-5-246 (1991) ("Shore Assistance Act of 1979"); Haw. Rev. Stat. §§ 205A-1 to 205A-49 (1988 & Supp. 1991) ("Coastal Zone Management"); La. Rev. Stat. Ann. §§ 49:213.1-49:214.41 (West. 1987 & Supp. 1991) ("Louisiana Coastal Wetlands Conservation, Restoration, and Management"); Me. Rev. Stat. Ann. tit. 38, §§ 480A-490 (1989 & Supp. 1991) ("Protection of Natural Resources" and "Site Location of Development"); *id.* tit. 38, §§ 1801-1905 ("Coastal Management Policies" and "Coastal Barrier Resource System"); Md. Nat. Res. Code Ann. §§ 8-1001 to 8-1105-1 (1990 & Supp. 1991) ("Shore Erosion Control" and "Beach Erosion Control and Replenishment"); Mass. Gen. Laws Ann. ch. 21A, § 4A (West Supp. 1991) ("Coastal Zone Management Office"); Miss. Code Ann. §§ 49-27-1 to 49-27-69 (1990) ("Coastal Wetlands Protection Law"); N.H. Rev. Stat. Ann. §§ 482-A:1 to 482-A:27 (Supp. 1990) ("Fill and Dredge in Wetlands"); N.J. Stat. Ann. §§ 13:19-1 to 13:19-21 (West 1979 & Supp. 1990) ("Coastal Area Facility Review Act"); N.Y. Envtl. Conserv. Law § 34-0101 to 34-0113 (McKinney 1984 & Supp. 1992) ("Coastal Erosion Hazard Areas"); N.C. Gen. Stat. §§ 113A-100 to 113A-134.3 (1991) ("Coastal Area Management Act of 1974"); Or. Rev. Stat. §§ 196.105-196.990 (1991) ("Wetlands and Rovers; Removal and Fill; Ocean Resources Planning"); R.I. Gen. Laws §§ 46-23-1 to 46-23-21 (1991) ("Coastal Resources Management Council"); S.C. Code Ann. §§ 48-39-10 to 48-39-360 (Law. Co-op. 1987 & Supp. 1990) ("Coastal Tidelands and Wetlands"); Tex. Nat. Res. Code Ann. §§ 33.001-33.176 (Vernon 1978 & Supp. 1992) ("Coastal Public Lands Management

of these statutes specifically address the problem of beach/dune erosion and establish "setbacks" beyond which new construction is generally prohibited.[2]

Defining "property" interests and serious public harms constituting "nuisances" traditionally has fallen within the province of state law. State and local governments

Act of 1973"); Va. Code Ann. §§ 62.1-13.21 to 62.1-13.28 (1987 & Supp. 1991) ("Coastal Primary Sand Dune Protection Act"); Wash. Rev. Code Ann. §§ 43.51.650-53.51.765 (West 1983 & Supp. 1991) ("Seashore Conservation Area").

See also Mich. Comp. Laws §§ 281.601-281.651a (West 1979 & Supp. 1991) ("Protecting Beaches and Sand Dunes"); Wis. Stat. Ann. § 59.971 (1991) ("Zoning of Shorelands on Navigable Waters").

[2] *See, e.g.*, Conn. Gen. Stat. Ann. §§ 22a-94, 22a-106 (West 1985 & Supp. 1990) (requiring permit for construction beyond coastal boundary, which is either the 100 year flood frequency coastal flood zone under the National Flood Insurance Act or a 1,000 foot linear setback from the mean high water mark); Del. Code Ann. tit. 7, §§ 6802, 6805 (1991) (requiring establishment of "building" line beyond which construction is prohibited without permit); Haw. Rev. Stat. §§ 205A-41 to 205A-49 (1988 & Supp. 1991) (shoreline setback policy established to prevent future construction within the "shoreline setback zone," set between 20 and 40 feet inland from the mean high tide line); Me. Rev. Stat. Ann. tit. 38, §§ 435, 439-A(4) (1989 & Supp. 1991) (prohibiting new structures or "substantial expansion" [more than 30%] of existing ones within 250 feet of the normal high water line); Md. Nat. Res. Code Ann. §§ 8-1102, 8-1105.1 (1990 & Supp. 1991) (prohibiting construction within the Beach Erosion Control District, coinciding in general with the west crest of the existing dune); N.J. Stat. Ann. § 13:19-5 (West 1979 & Supp. 1990) (prohibiting construction without a permit in coastal area); N.Y. Envtl. Conserv. Law § 34-0108(3)(a) (McKinney 1984 & Supp. 1992) (Commissioner must establish minimum setback requirement for structures); N.C. Gen. Stat. §§ 113A-113(b)(6)(a), 113A-120(a)(6) (1991) (Coastal Commission to designate areas of environmental concern, including natural-hazard areas such as "sand dunes along the Outer Bank," and to deny permits in such areas where development would "unreasonably endanger life or property"); S.C. Stat. Ann. § 48-39-290 (Law Co-op. Supp. 1990) (no new structures may be constructed in defined coastal zones subject to certain exceptions).

could be seriously disrupted by a departure from the "nuisance" exception or multi-factor test repeatedly applied by the Court to takings claims.

Because this Court's decision will have a substantial effect on matters of great importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.[3]

SUMMARY OF ARGUMENT

I.

Federal courts should exercise restraint in their review of claims that state land use regulations constitute takings. As suggested by several decisions of this Court, findings of Takings Clause violations based on state enactments should be made only when "fairness and justice" so require.

A. The Court should not imbue the term "property" with some federal or natural law meaning. The Court cannot find that state regulation effects a taking of property without superimposing on state law some baseline for property rights that the State already has explicitly or implicitly rejected by adopting and sustaining the regulation. It is just this subjective preference in Constitutional rulemaking that the Court has repeatedly warned against in insisting that property rights are created by state law.

B. Petitioner's suggestion that federal courts should exercise *de novo* review over state judgments that certain land uses constitute nuisances would violate longstanding principles of federalism. In view of the lack of consensus concerning what activities constitute a nuisance, such review of necessity would involve intrusive disagreements with state courts' or legislatures' evaluations of the harms

[3] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.3 of this Court.

and benefits of different activities. In addition, any attempt by this Court to "federalize" an objective standard of harmful or nuisance-like property uses likely would stunt the careful evolution of the common law in response to, among other things, changing scientific understanding of the physical interrelationship between once seemingly distinct activities.

For similar reasons, the Court should not be quick to second-guess a state legislative, executive or judicial determination that a particular police measure is needed to avoid serious injury to public health and welfare. Here, the South Carolina legislature and respondent possess far more expertise than does this Court regarding the peculiar risks caused by construction on fragile areas of the South Carolina coast.

II.

A. Petitioner's request of this Court to abandon the "nuisance" exception to the Takings Clause should be rejected. The "nuisance" exception stands for the simple proposition that a State may prohibit uses of property that are harmful to the community because such uses are not included in ownership rights. The nature of the harm against which the South Carolina statute is directed is well within the class of harms contemplated by this Court in cases applying the "nuisance" exception.

The legislature of South Carolina is intimately familiar with the serious dangers to life and property that are posed by erosion exacerbated by development too close to the shoreline. The Beachfront Management Act explicitly recognizes these harms and also makes clear the close connection between the prevention of beach erosion and the Act's ultimate purpose of protecting life and property.

B. Petitioner's claim that loss of economic viability may result in a finding of an unconstitutional taking without regard to the other factors used by this Court to analyze takings claims also is without merit. Every

takings case decided by this Court has properly inquired into the nature of the government's action.

Here, in view of the compelling state purpose, the statute does not work an unconstitutional taking when analyzed under the "multi-factor" test. Neither the economic impact nor the effect on petitioner's "reasonable investment-backed expectations" outweighs the government's purpose.

C. The only issue petitioner put to the courts below was whether the deprivation of all economically viable use necessarily constituted a taking. The Supreme Court of South Carolina properly rejected this extreme view. Petitioner's failure to challenge the statute's purpose or methodology in the state courts requires affirmance of the decision below on this ground as well.

ARGUMENT

I. SOUND PRINCIPLES OF FEDERALISM COUNSEL RESTRAINT IN REVIEWING CLAIMS THAT STATE LAND USE REGULATIONS CONSTITUTE TAKINGS.

Well-settled principles of federalism counsel restraint in applying federal law notions of property and nuisance to South Carolina's Beachfront Management Act.

A. This Court Properly Looks to State Law to Define Property Rights.

In this case the South Carolina legislature, respondent (a South Carolina administrative agency), and the South Carolina Supreme Court agreed that South Carolina property rights do not include the right to build a permanent structure seaward of a scientifically drawn erosion baseline because doing so causes severe public harm. A contrary determination by this Court would necessarily rest on a ruling that land ownership in South Carolina *does* include this right of hazardous construction. The only available sources for this conclusion are the opinions of

the members of this Court about what ideal property rights should embrace. But it is just this subjective preference in Constitutional rulemaking that the Court has repeatedly warned against in insisting that property rights are created by state law.

In rejecting numerous pleas to expand federal protection of property rights, the Court properly has insisted that property rights are created and defined by state law. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980); *Bishop v. Wood*, 426 U.S. 341, 344 (1976). The federal Constitution itself does not engender any property rights. *Paul v. Davis*, 424 U.S. 693 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).

In *PruneYard*, owners of a shopping center open to the public challenged, on Just Compensation Clause grounds, a provision of the California constitution that permitted individuals to exercise free speech rights on the shopping center premises. In concluding that there was no unconstitutional taking, the Court distinguished the facts in *PruneYard* from the federal government's actions in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), on the ground that "the United States, *as opposed to the several States*, [is not] possessed of residual authority that enables it to define 'property' in the first instance." 447 U.S. at 84 (emphasis added). In so holding, the Court indicated the necessity of affording the States greater leeway than the federal government in the field of land use regulation.

As the Court also observed in *PruneYard*, "[a] State is, of course, bound by the Just Compensation Clause of the Fifth Amendment." *Id.* A State may not manipulate the contours of property law so as to eviscerate the protections afforded by this (or any other) Constitutional provision. Nevertheless, in determining whether certain interests constitute "property" for purposes of the Constitution, this Court is "mindful of the basic axiom that '"[p]roperty interests . . . are not created by the Consti-

tution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984) (citations omitted). *See also Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 518-19 (1987) (Rehnquist, C.J., dissenting) ("We have evaluated takings claims by reference to the units of property defined by state law."). Thus, while a concern for the States' role in defining property rights does not deprive the Court of a role in assessing the fairness of state land use rules, it plainly counsels judicial restraint. As suggested in *PruneYard* itself, findings of Takings Clause violations based on state enactments should be made only when "fairness and justice" so require. 447 U.S. at 83. *See also Armstrong v. United States*, 364 U.S. 40, 49 (1960).

B. The Formulation of Laws Addressing Harmful, Nuisance-Like Uses of Property Is Best Left to The States.

Petitioner argues (Br. 11) that there should be an "objective" federal definition of nuisance-like harms for purposes of Takings Clause litigation. Adoption of such an unprecedented rule would violate long established principles of federalism in several respects.

Given the variations among the States in defining nuisance, adoption of a federal standard would displace state decisionmaking at the core of its traditional power to define property rights and recognize tort actions. A leading authority describes nuisance as an area of law that "straddles the legal universe, virtually defies synthesis, and generates case law to suit every taste." W. Rodgers, *Environmental Law* § 2.4, at 48 (1986). Indeed, the "clearest" statement of nuisance, the Restatement (Second) of Torts, defines an actionable nuisance as the intentional and unreasonable invasion of another's interest in property (Section 822) and then provides (in Section 826):

> An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if
>
> (a) the gravity of the harm outweighs the utility of the actor's conduct, or
>
> (b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.[4]

Obviously, any dispute will require a court to make loosely guided policy judgments about the comparative magnitudes of harms and benefits of the parties' uses of land. *See* Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972). Federal court review thus could not be "objective," but of necessity would involve intrusive disagreements with state courts' or legislatures' evaluations of the harms and benefits of different activities.

Further, the strength of the Nation's common law tradition lies in its contextual application, which partly explains our historical reliance on state law and state courts for its formation. Local determinations are naturally more appropriate for the site-specific and value-laden judgments inherent in the fashioning of nuisance law. As described by the Court in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926), "whether a particular thing is a nuisance is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality. . . . A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard."

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[4] Fifteen States have adopted the broad formulation of "unreasonableness" of the Restatement, while virtually all the others employ even vaguer standards that require courts to determine if the defendant's conduct and/or the plaintiff's losses are unreasonable "under all the circumstances." Jeff L. Lewin, *Boomer and the American Law of Nuisance: Past, Present, and Future*, 54 Alb. L. Rev. 189, 234-35 (1990).

For this reason, petitioner's asserted belief (Br. 44) that a residential home cannot be a nuisance is entirely misguided. To be sure, in most places construction of a residential home would not present dangers to human health and safety. But the fragile, ever-shifting ground near the shoreline is not like most places. There, residential homes, like other permanent structures, present acute risks. That their purpose is residential does not render them somehow immune from the physical mechanics of the coastal zone. In short, a residential home may well be a "right thing," but that fact does not obviate the possibility that the physical characteristics of certain properties may render them the "wrong place" for its location. More generally, the fact that the definition of an activity as a nuisance depends so heavily on the context renders illusory the notion of an objective federal standard for nuisance.

Drawing on state sources of nuisance law in the resolution of takings cases is not only necessary, it is also a salutary feature of the common law tradition. It is essential for the life of the common law that States remain free to determine for themselves what kinds of risks will be tolerated under tort-like standards. *See Gregory v. Ashcroft*, 111 S. Ct. 2395, 2399 (1991) (the "federalist structure of joint sovereigns . . . allows for more innovation and experimentation in government"); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country"). Any attempt by this Court to "federalize" an objective standard of nuisance-like harms for purposes of takings litigation likely would stunt the careful evolution of the common law.

For similar reasons, the Court should not be quick to second guess a state legislative, administrative, or judicial

determination that a particular police power measure is needed to avoid serious injury to public health and welfare.[5] Here, the South Carolina legislature as well as respondent South Carolina Coastal Council have had far more experience, and possess far more expertise, than does this Court regarding the peculiar risks caused by construction on fragile areas of the South Carolina coast.[6] South Carolina has had to deal with the personal tragedy associated with unwise development in those areas.[7]

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[5] *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. at 1007; *id.* at 1014 ("[t]he role of the courts in second-guessing the legislature's judgment of what constitutes a public use is extremely narrow"); *id.* at 1016 n.18 ("[o]ur review is limited to determining that the purpose is legitimate and that Congress rationally could have believed that the provisions would promote that objective"); *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984) (citations omitted) ("the Court has made clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be palpably without reasonable foundation'"); *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928) ("we should not be warranted in substituting our judgment for that of the zoning authorities primarily charged with the duty and responsibility of determining the question"); *Miller v. Schoene*, 272 U.S. 272, 279 (1928) ("[w]hen forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public").

[6] *See* S.C. Beachfront Management Act, 1988 Act No. 634, *codified at* S.C. Code Ann. §§ 48-39-10 *et seq.* (Law. Co-op. Supp. 1990), as amended by 1990 Act No. 607; S.C. Coastal Zone Management Act 1977 Act No. 123, *codified at* S.C. Code Ann. §§ 48-39-10 *et seq.* (Law. Co-op. 1987). After 11 years of experience, and following the advice of a specially-appointed Blue Ribbon Committee, the South Carolina Legislature concluded that the 1977 Act "did not provide adequate jurisdiction to the South Carolina Coastal Council to enable it to effectively protect the integrity of the beach/dune system." S.C. Code Ann. § 48-39-250(4) (Law. Co-op. Supp. 1990).

[7] *See* H. Crane Miller, *Hurricane Hugo: Learning From South Carolina* (1990) *reprinted in Coastal Erosion and Erosion Management: Hearing before the Subcomm. on Policy Research and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 101st Cong., 2d Sess. 234-83 (1990) ("Miller") at 39-40.

States such as South Carolina have been compelled to expend massive sums of monies literally to rescue persons, such as petitioner, from the dangers posed by substantial development close to the ocean.[8] Indeed, South Carolina is only one of many coastal States that have adopted laws regulating beachfront development, including the prohibition of building in areas judged to be at too great an erosion risk. *See* notes 1-2, *supra*.[9]

It is also appropriate for the Court to exercise restraint because property owners are not a discrete and insular minority unable to protect their interests in the state political process. Indeed, South Carolina's respect for property rights is evidenced by the fact that the 1988 Act exempted existing construction from its setback requirements. S.C. Stat. Ann. 48-39-290(6)(i)-(v) (Law. Co-op. Supp. 1990). The 1990 Amendments likewise evidence the State's sensitivity to property rights.[10]

This Court has long wisely declined an active role in state land use decisions. In only two cases—both decided in the 1920's—has the Court found takings where state law regulated land use without effecting a physical invasion. In *Nectow*, the Court found violative of due process a zoning ordinance that severely reduced the value of the plaintiff's property for no stated or apparent public purpose. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393

[8] *Miller* at 25-27, 42 (describing the South Carolina Windstorm Insurance Program).

[9] The National Research Council has recommended adoption throughout the Nation of minimum state standards for coastal development. Standards urged by NRC include a prohibition on construction within the 10 year erosion zone and permitting only readily movable structures within the 60 year erosion zone. National Research Council, *Managing Coastal Erosion* 6-7 (1990).

[10] In view of petitioner's failure to avail himself of the rights afforded by the 1990 amendments, *amici* agree with respondent that, as an alternative to affirmance, the Court could dismiss the petition as improvidently granted or remand the case as not ripe for review. *See also* U.S. Br. 8-10.

(1922), reflects the Court's concern about the unfairness of legislation freely transferring to surface owners the very property right to support that they had conveyed to mineral owners in prior bargaining. These opinions eschew mechanical rules in favor of broad principles capable of supporting open ended inquiries into the fundamental fairness of the State's law. *See* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967). Petitioner's treatment of isolated statements in these cases as independent, *per se* federal law requirements for state land use initiatives is seriously mistaken.[11]

II. WHETHER ANALYZED UNDER THE "NUISANCE" EXCEPTION OR THIS COURT'S MULTI-FACTOR TEST, THE APPLICATION OF SOUTH CAROLINA'S BEACHFRONT MANAGEMENT ACT TO PETITIONER'S PROPERTY PASSES CONSTITUTIONAL MUSTER.

A. The Harm Against Which The Beachfront Management Act Is Directed Is Well Within The Class of Harmful Uses Contemplated By The "Nuisance" Exception.

1. *The "Nuisance" Exception Permits States To Prohibit Harmful Uses of Property Without Providing Compensation Even Where No Economic Viability Remains.*

Petitioner asks the Court to disavow a principle that has been an integral part of its takings jurisprudence for more than a century. The central place that the so-

[11] *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), involved a permanent physical occupation. *See id.* at 832, quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432-33 n.9 (1982). Because this case does not involve a permanent physical occupation of petitioner's property, *Nollan* is inapplicable. Nonetheless, *Nollan* supports this emphasis on fundamental fairness since the Court focused on the lack of any connection between the State's proclaimed goals and its chosen means, and voiced concern that the means amounted to unjust "extortion." 483 U.S. at 837.

called "nuisance" exception occupies in takings law, however, is due not only to its historicity, but also to the significant function that it serves. As this Court has recognized, one of the highest purposes for which government is organized is the protection of the safety and health of its citizens. *See Mugler v. Kansas*, 123 U.S. 623, 684-85 (1887). The "nuisance" exception embodies the recognition that the Just Compensation Clause in no way jeopardizes the government's observance of this fundamental duty towards its citizens. The exception simply provides that the protection of the public safety and health does not depend upon the ability of the public purse to compensate individuals who use their property to harm the public. Moreover, the "nuisance" exception does not weaken the protections of the Fifth Amendment "since no individual has a right to use his property to create a nuisance or otherwise harm others" and therefore "the State has not 'taken' anything when it asserts its power to enjoin the nuisance-like activity." *Keystone*, 480 U.S. at 491 n.20.

Numerous cases since *Mugler* have upheld this essential power of state legislatures or local governments to prohibit uses of property that harm others. *See, e.g., Keystone*, 480 U.S. at 490-91; *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Miller v. Schoene*, 276 U.S. 272; *Zahn v. Board of Pub. Works*, 274 U.S. 325 (1927); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365; *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Reinman v. City of Little Rock*, 237 U.S. 171 (1915); *Powell v. Pennsylvania*, 127 U.S. 678 (1888); *see also Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 144 (1978) (Rehnquist, J., dissenting) ("[a]s early as 1887, the Court recognized that the government can prevent a property owner from using his property to injure others without having to compensate the owner for the value of the forbidden use").

To be sure, "[t]he nuisance exception . . . is not coterminous with the police power itself." *Keystone*, 480

U.S. at 491 n.20 (citation omitted). Thus, even *amici*, who are dependent upon the principle for the power effectively to govern, recognize that it has limits. Indeed, we generally concur in the United States' assertion (Br. 18-19) that the greater part of the regulatory measures coming within the exception will be those "designed to protect public health and safety from serious harm" rather than those that seek to "confer a *benefit* on adjacent property owners or the public at large." [12]

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[12] While this distinction may have a degree of utility as a narrowing principle, the decisions of this Court do not support the view that it furnishes an invariable definition of which regulatory measures qualify for the "nuisance" exception. Among the decisions that fail to adhere to the United States' proposed rule is *Chicago, B. & O. R. Co. v. Illinois*, 200 U.S. 561 (1906). In that case, the Court was presented with the argument, remarkably similar to that now advanced, that the Court's "adjudications relating to the police power of the state to protect the public health, the public morals, and the public safety are not applicable, in principle, to cases where the police power is exerted for the general well-being of the community apart from any question of the public health, the public morals, or the public safety." *Id.* at 592. The state action in question was a program designed to secure for the community additional tillable lands fit for agriculture. *Id.* Notwithstanding the argument that the measure did not have "anything to do with the health" of the community, Justice Harlan, writing for the Court, rejected the property owner's position that a "taking" had occurred. *Id.* Because the State's action was designed to "promote the public convenience or the general prosperity," the Court held that the exercise of such power could not be conditioned upon compensation. *Id.* at 592-93.

The Court has indicated in three other decisions that the United States recognizes as consistent with "*Mugler*'s fundamental principles" (Br. 16-17 n.11) that the regulatory restrictions in question were based on the expectation of "widespread public benefit" rather than on "any supposed 'noxious' quality of the prohibited uses." *See Penn Cent.*, 438 U.S. at 134 n.30 (discussing *Hadacheck*, *Miller* and *Goldblatt*). Nevertheless, it is not necessary for purposes of this case to decide whether the nuisance exception extends beyond the "protect[ion] of the public health and safety from serious harm" since the South Carolina Beachfront Management Act easily satisfies even that standard. *See* discussion *infra* at 18-20.

Nevertheless, while the "nuisance" exception does not extend to the limits of a state's police power, it would be irrational to restrict it to measures that prohibit only common law nuisances. Common law nuisance cases address harms imposed by one landowner on his neighbor, whereas police power legislation also can prevent serious harm caused by many landowners, even when the harm is spread over so many people that no one neighbor may have sufficient incentive to bring a nuisance suit.[13] In addition, common law judges lack the expertise effectively to address pervasive, scientifically complex harms to the public within the context of private litigation.[14] If the Court were now to narrow the category of police power legislation immune from Takings Clause challenges to abatement of common law nuisances,[15] it would seriously hamper States in addressing innumerable environmental problems that threaten public health and safety.

Furthermore, contrary to petitioner's suggestion (Br. 20-28), this Court has recognized repeatedly that government may enact laws that result in the "destruction" of private property. *See, e.g., Penn Central*, 438 U.S. at

[13] For example, in the classic case of *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870, 873 (N.Y. 1970), the court refused to enjoin air pollution by a defendant in a nuisance suit on the ground that the complexities of reducing air pollution ought to be left to the legislature, which could weigh the costs and benefits of differing rules for society as a whole in light of extensive scientific evidence.

[14] "[N]uisance law could not adequately respond to the problems of air and water pollution. Informational, procedural, and financial barriers would preclude most affected parties from bringing nuisance suits against pervasive nuisances with widespread impact on the general public health and welfare. . . . Due to its inherent limitations, nuisance law generally has been relegated to marginal cases, involving small-scale, localized land use conflicts." Lewin, *supra*, 54 Alb. L. Rev. at 229-30.

[15] The Court, of course, has never done so. The brewery closed in *Mugler* was not itself a common law nuisance; the Court there upheld a state constitutional amendment that reflected a democratic judgment about the social harms of alcoholic beverages.

125, citing *Nectow v. City of Cambridge*, 277 U.S. 183 ("in instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that *destroyed* or adversely affected recognized real property interests") (emphasis added); *Miller v. Schoene*, 276 U.S. at 280 ("preferment of [the public interest] over the property interest of the individual, *to the extent even of its destruction*, is one of the distinguishing characteristics of every exercise of the police power that affects property") (emphasis added); *Omnia Commercial Co. v. United States*, 261 U.S. 502, 508 (1923) ("destruction of, or injury to, property is frequently accomplished without a 'taking' in the constitutional sense"); *Mugler v. Kansas*, 123 U.S at 669 ("the destruction of property which is itself a public nuisance . . . is very different from taking property for public use"); *see also Penn Central*, 438 U.S. at 144 (Rehnquist, J., dissenting) (describing the "nuisance" exception as one of "the two exceptions where the destruction of property does not constitute a taking").

In *Powell v. Pennsylvania*, 127 U.S. 678, for example, a party challenged, on Just Compensation grounds (127 U.S. at 687), legislation that prohibited his manufacture of oleomargarine, and offered to prove

> that for the purpose of prosecuting that business large investments were made by him in the purchase of suitable real estate, in the erection of proper buildings, and in the purchase of the necessary machinery and ingredients; that in his traffic in said article he made large profits; and, if prevented from continuing it, the value of his property employed therein would be entirely lost, *and he be deprived of the means of livelihood*.

Id. at 682 (emphasis added). Notwithstanding this claim, the Court held that the "case, in its important aspects, is

governed by the principles announced in *Mugler* . . . ." *Id.* at 683.[16]

2. *The Beachfront Management Act's Purpose Of Protecting Lives And Property Satisfies the "Nuisance" Exception.*

Shore erosion presents difficult problems for jurisdictions along tidal and Great Lakes shorelines. Currents drive sand along the shore, keeping the beach area unstable.[17] Absent extensive development, erosion is a natural and harmless process of equilibrium between sand and sea.[18] With greatly intensified residential development at the shore,[19] however, erosion can undermine and sometimes destroy structures built too close to the beach, at the same time exacerbating the vulnerability of coastal development to flood damage from hurricanes and other

[16] In *Mugler* itself, the Court characterized the brewery owners' argument as follows:

> [T]hat, as the primary and principal use of beer is as a beverage; as their respective breweries were erected when it was lawful to engage in the manufacture of beer for every purpose; *as such establishments will become of no value as property*, or, at least, will be materially diminished in value, if not employed in the manufacture of beer for every purpose . . . .

123 U.S. at 664 (emphasis added). Thus, in *Mugler*, the Court acknowledged that the result of applying the "nuisance" exception in the circumstances of that case could be the elimination of all economic value of the property. In the Court's view, however, such a result was no obstacle to the enforcement of legislation "appropriate or needful for the protection of the public morals, the public health, or the public safety." *Id.* at 661.

[17] William J. Neal, *et al.*, *Living with the South Carolina Shore* 35 (1984).

[18] Dennis J. Hwang, *Shoreline Setback Regulations and the Takings Analysis*, 13 U. Haw. L. Rev. 1, 3-4 (1991).

[19] Rutherford H. Platt, *et al.*, *The Folly at Folly Beach and Other Failings Of U.S. Coastal Erosion Policy*, 33 Env't 7, 8 (Nov. 1991). *See also* David W. Owens, *Where Erosion and Development Meet*, EPA Journal Sept.-Oct. 1989, at 44-45.

major storms.[20] This causes not only property loss, but death and serious injury.[21] Attempts to fortify shorelines against erosion through construction of sea walls, groins and jetties require massive public expenditures and often exacerbate erosion downcurrent from the project.[22] Construction that weakens dune structures also accelerates erosion.[23] When losses occur through floods and undermining, public authorities must provide expensive aid, both through emergency services and reimbursements from the publicly subsidized National Flood Insurance Program, 42 U.S.C.A. §§ 4001-4128 (West 1977 & Supp. 1989), and disaster assistance relief through the Federal Emergency Management Agency.

On the basis of such data, the legislature of South Carolina reasonably determined that building too close to the ocean causes irreparable harm:

> Erosion is a natural process which becomes a significant problem for man only when structures are erected in close proximity to the beach/dune system. It is in both the public and private interests to afford the beach/dune system space to accrete and erode in its natural cycle. This space can be provided only by discouraging new construction in close proximity to the beach/dune system and encouraging those who have erected structures too close to the system to retreat from it.

S.C. Stat. Ann. § 48-39-250(6). Moreover, the statute makes clear the close connection between the beach erosion it seeks to prevent and its ultimate purpose of protecting

[20] Natasha Zalkin, *Shifting Sands and Shifting Doctrines: The Supreme Court's Changing Takings Doctrine and South Carolina's Coastal Zone Statute*, 79 Cal. L. Rev. 205, 212 (1991).

[21] *Id.* at 213.

[22] National Research Council, *Managing Coastal Erosion*, *supra*, at 59-60.

[23] Neal, *supra*, at 43-48.

life and property. The beach/dune system, the Legislature found,

> protects life and property by serving as a storm barrier which dissipates wave energy and contributes to shoreline stability in an economical and effective manner; . . . .

S.C. Stat. Ann. § 48-39-250(1)(a).

While the Act also acknowledges the significance of the State's coastline to the tourist industry, *see* S.C. Stat. Ann. § 48-39-250(8), the Act's "legislative findings" (§ 48-39-250) and "policy statement" (§ 48-39-260) amply demonstrate that there is no basis for petitioner's assertion that "[a]lthough the concern of beach erosion harming private property is mentioned in the Act, . . . this appears to be a remotely-perceived harm." Pet. 40. Indeed, the first item mentioned in both statutory provisions is the State's primary goal of "protect[ing] life and property." *See* Pet. App. 98, 102.

In any event, the fact that the preservation of South Carolina's shoreline likely would have the additional effect of aiding the State's tourist industry provides no basis for requiring compensation. The prohibition on locating stables in the busiest part of Little Rock, Arkansas, that was at issue in *Reinman v. Little Rock*, 237 U.S. 171 (1915), likely enhanced tourism in that City. *See id.* at 174 (City averred that the regulated locality "contain[ed] the largest and best hotels in the state" and that "there is always an offensive odor coming from said stables, to the great detriment of . . . hotel guests"). That additional factor, however, did not deter this Court from concluding that no compensation was due the stable owners to whose property the ordinance was applied. There is no reason for a different result here.[24]

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[24] Likewise, it is difficult to see the logic of the argument suggested by the United States (Br. 20), which would accord significance to the fact that a particular regulation might serve more than one purpose. If it is determined that a regulation does, indeed, bear a rational relation to a valid health or safety purpose, the mere fact that the same regulation may also have other benefits should not be relevant.

B. The Beachfront Management Act Plainly Satisfies This Court's Multi-Factor Test.

1. *This Court's Multi-Factor Test By Definition Takes Into Account More Than Remaining Economic Viability* Vel Non.

Petitioner claims that a regulation that prohibits a landowner from building a permanent dwelling on his property constitutes a taking *solely* because of its effect on the property's market value. However, as the Court explained in *Goldblatt v. Town of Hempstead*, 369 U.S. at 594 (citations omitted), "[a]lthough a comparison of values before and after is relevant, . . . it is by no means conclusive . . . ."

Instead, the Court has established a multi-factor analysis, acknowledging that it

> has generally "been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." Rather, it has examined the "taking" question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the government action—that have particular significance.

Keystone, 480 U.S. at 495 (citations omitted). "Many cases before and since *Pennsylvania Coal* have recognized that the nature of the State's action is critical in takings analysis." *Keystone*, 480 U.S. at 488 (footnote omitted).

Even *Agins v. City of Tiburon*, 477 U.S. 255 (1980), much relied upon by petitioner (Br. at 15-16), states that, "[a]lthough no precise rule determines when property has been taken, the question necessarily requires a weighing of private and public interests." 447 U.S. at 260-61 (citations omitted).[25] This Court has never invalidated a regulation based solely on its effect on a property's economic viability under *Agins*.[26] Rather, in every takings cases the Court properly examines the goals and methodologies of the regulation. Indeed, in *PruneYard Shopping Center v. Robins*, 447 U.S. at 83, decided the day before *Agins*, the Court employed the same multi-factor test that petitioner's position would require the Court to jettison.

2. *The Compelling Public Interest That Is Served By The South Carolina Statute Outweighs The Other Two Factors Comprising The Multi-Factor Test.*

a. *Character Of The Government Action.*

This Court's multi-factor test also is satisfied by the Beachfront Management Act. The nature of the governmental action in this case is compelling. *See* discussion

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[25] Petitioner concedes (Br. 16) that "the Court has indicated that the two-part *Agins* test should be used only in facial challenges of regulations, while the three-prong *Penn Central* factors should be reserved for cases in which a regulation is challenged as applied to a certain parcel of land (as is true here)."

[26] Indeed, the Court has never invalidated a regulation *solely* because of no remaining economic viability. In *United States v. Lynah*, 188 U.S. 445 (1903), this Court found that a taking for which compensation was required had occurred where the government's obstruction of the natural flow of the Savannah River resulted in the permanent flooding of a privately owned plantation and the total destruction of its value. The Court has explained that its decision in *Lynah* was the result of the fact that "a permanent physical occupation" occurred in that case. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 428.

supra at 18-20. Neither of the other factors that comprise this test outweighs the substantiality of the State's purpose.

b. *Reasonable Investment-Backed Expectations.*

Contrary to petitioner's claims, to provide a basis for "reasonable investment-backed expectations," significantly more is required than passage of legislation like the 1977 Act, which applies generally to the South Carolina shoreline, albeit in a less restrictive fashion than the 1988 Act. Rather, some sort of affirmative act by the government regarding the particular property in question is required to justify reliance by the property owner.

For example, in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, the Court held that compensation might be required where an applicant for registration of a pesticide submitted trade secret information to the EPA based on statutory "explicit assurance" of non-disclosure. *Id.* at 1011. In periods where the statute did not provide these guarantees, no compensation was required. *Id.* at 1006-07.

Similarly in *Kaiser Aetna v. United States*, 444 U.S. 164, a private property owner dredged the entrance to a lagoon with the express approval of the Army Corps of Engineers and with the expectation that the lagoon would remain private. When the government declared the lagoon to be a public waterway subject to a navigational servitude, this Court found an unconstitutional taking. Unlike *Monsanto* and *Kaiser Aetna*, there was no such affirmative act by South Carolina in this case that could give rise to any reasonable investment-backed expectations on petitioner's part.

c. *Economic Viability.*

As shown above (pp. 16-17, 21-22, *supra*), petitioner's contention that the economic impact of the regulation is alone determinative is contrary to well-settled law. Even if it were not, however, the trial court's finding that

petitioner's properties were rendered "valueless" (Pet. App. 37) is not conclusive. The trial court focused solely and mistakenly, on the highest and best use of petitioner's property, *i.e.*, the construction of habitable dwellings thereon. *See Goldblatt*, 369 U.S. at 592 (if a regulation "is otherwise a valid exercise of the [government's] police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional").

The trial court erred by failing to consider the worth of the remaining strands in petitioner's bundle of property rights. *Keystone*, 480 U.S. at 497. Specifically, petitioner still can enjoy several other attributes of ownership, including the right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property . . . ." *Kaiser Aetna*, 444 U.S. at 176. Thus, he can enjoy the privacy and solitude of a beachfront area that was considered so valuable in *Nollan v. California Coastal Commission*, 483 U.S. 825. Petitioner can picnic, swim, camp in a tent or live on the property in a moveable trailer. *See Hall v. Board of Envtl. Protection*, 528 A.2d 453 (Me. 1987) (despite denial of building permit, beneficial and valuable uses of beachfront property remain, such as living in a camper). Based on his right to exclude, petitioner can charge others for the use of his beach. Petitioner also retains the right to alienate the land, which would have value for neighbors and for those prepared to enjoy proximity to the ocean without a house.

Whether analyzing a limitation on the right to alienate, to devise, to exclude, or most frequently, to use, this Court has never focused solely on the diminution in value of only one portion of the property's value.[27] To do so would allow challenges to regulations that affect increasingly

[27] *Cf. Hodel v. Irving*, 481 U.S. 704 (1987) (total abolition of right of descent and devise found a taking where the government's purpose of consolidating increasingly divided Indian lands was not accomplished by the regulation).

subdivided property interests. Indeed, if petitioner's theory that a deprivation of all economic viability automatically works a taking were combined with the trial court's bundle-splitting view of what constitutes the property taken, virtually any regulation would be subject to challenge on the ground that the government had deprived a property owner of all economic use of some strand of his property that deserves separate recognition. This Court wisely has never endorsed such a view.

C. Petitioner's Sole Reliance On A "Finding" Of No Remaining Economic Viability Alone Provides A Basis For Affirming The Decision Below.

Petitioner chose not to question the statute in either of the South Carolina courts, relying instead solely on diminished "economic viability."[28] Given that the Court always has insisted that constitutional inquiry in this area requires consideration of the gravity of the public harm being addressed as well as the loss sustained by the owner, petitioner's concessions compel the Court to rule for respondent.[29] The burden of proof applicable to

[28] *See* Pet. App. 4 ("[petitioner] admittedly fails to attack the validity of the Act, and therefore concedes the validity of the legislative declaration of its 'findings' and 'policy' embodied in Sections 1 and 2 of 1988 Act No. 634") (footnote omitted); *id.* at 9 ("[petitioner] maintains that if a regulation operates to deprive a landowner of 'all economically viable use' of his property, it has worked a 'taking' for which compensation is due, *regardless of any other consideration*") (emphasis added); *id.* at 35 ("[petitioner's] complaint does not challenge the constitutionality of the Beachfront Management Act, nor does it challenge the right of the General Assembly to regulate the use of his property").

[29] The United States urges the Court to remand the case to permit the South Carolina courts to assess the degree of public harm presented by the statute and balance this against the loss to petitioner. But the South Carolina Supreme Court proceeded as it did because petitioner insisted that these considerations were immaterial. Given the applicable burden of proof and the presumption of regularity

takings challenges and the presumption of regularity afforded democratic state decisionmaking require this conclusion.

In order to evaluate the landowners' takings claim in *Goldblatt v. Town of Hempstead*, the Court explained that it "need[ed] to know such things as the nature of the menace against which [the ordinance] will protect, the availability and effectiveness of other less drastic protective steps, and the loss which [the owners] will suffer from the imposition of the ordinance." 369 U.S. at 595. Because of the "dearth of relevant evidence on these points" (*id.*), the Court rejected the landowners' challenge. *Id.* at 596 ("[o]ur past cases leave no doubt that appellants had the burden on 'reasonableness'"). *See also Keystone*, 480 U.S. at 485 (property owners "have not satisfied their burden of showing that the Subsidence Act constitutes a taking").

The Supreme Court of South Carolina, absent challenge by petitioner, correctly presumed the validity of the statute's purpose and the methodology for accomplishing that purpose. Simply put, "debatable questions as to reasonableness are not for the courts but for the Legislature." *Goldblatt*, 369 U.S. at 595 (citation omitted). *See also* cases cited in note 5, *supra*. This presumption in favor of validity places the burden of challenging the statute squarely on petitioner. Petitioner failed to carry that burden.

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that attaches to all validly enacted state legislation, the Court should affirm the decision below.

Although we believe that affirmance is required on this ground, we do not agree with the South Carolina Supreme Court's view that because petitioner conceded that the statute was a valid exercise of the police power he *necessarily* also conceded nuisance. As discussed above (pp. 14-15, *supra*), the nuisance exception is not coterminus with the State's exercise of its police power.

CONCLUSION

The judgment of the Supreme Court of South Carolina should be affirmed.

Respectfully submitted,

BARBARA E. ETKIND
CHARLES T. BLAIR
SETH D. BERLIN
ROSS, DIXON & MASBACK
601 Pennsylvania Ave., N.W.
North Building
Washington, D.C. 20004
(202) 662-2000

J. PETER BYRNE
GEORGETOWN UNIVERSITY
LAW CENTER
600 New Jersey Ave., N.W.
Washington, D.C. 20001
Of Counsel

RICHARD RUDA *
Chief Counsel
MICHAEL G. DZIALO
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 638-1445

* *Counsel of Record for the* Amici Curiae

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DAVID H. LUCAS

Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL

Respondent.

On Writ of Certiorari
To The South Carolina Supreme Court

BRIEF OF NUECES COUNTY, TEXAS; SCITUATE, MASSACHUSETTS CONSERVATION COMMISSION; CHATHAM, MASSACHUSETTS CONSERVATION COMMISSION; AMERICAN LITTORAL SOCIETY; CHESAPEAKE BAY FOUNDATION; COAST ALLIANCE; ENVIRONMENTAL DEFENSE FUND; NATIONAL AUDUBON SOCIETY; NATURAL RESOURCES DEFENSE COUNCIL; NATIONAL WILDLIFE FEDERATION; SOUTH CAROLINA WILDLIFE FEDERATION; DR. JOSEPH F. DONOGHUE; DR. PAUL T. GAYES; DR. JOSEPH T. KELLY; DR. ORRIN PILKEY; DR. RUTHERFORD H. PLATT AND DR. STAN RIGGS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

NATURAL RESOURCES DEFENSE COUNCIL
SARAH CHASIS
40 West 20th Street
New York, New York 10011
(212) 727-4423

NUECES COUNTY
CARLOS VALDEZ
NUECES COUNTY ATTORNEY
901 Leopard Street
Corpus Christi, Texas 78401
(512) 888-0286

NATIONAL AUDUBON SOCIETY
PETER A.A. BERLE*
JOHN D. ECHEVERRIA
950 Third Avenue
New York, New York 10022
(212) 546-9100

*Counsel of Record for Amici Curiae

[Additional Counsel Listed On Inside Front Cover]

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

BEST AVAILABLE COPY

NATIONAL WILDLIFE FEDERATION
GLENN P. SUGAMELI
1400 16th Street, N.W.
Washington, D.C. 20036
(202) 797-6865

ENVIRONMENTAL DEFENSE FUND
TIM SEARCHINGER
257 Park Avenue South
New York, New York 10010
(212) 505-0606

CHESAPEAKE BAY FOUNDATION
ANN POWERS
162 Prince George Street
Annapolis, Maryland 21401
(301) 261-2350

HOPE BABCOCK
Of Counsel
GEORGETOWN LAW CENTER
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9481

ZYGMUNT J.B. PLATER
Of Counsel
BOSTON COLLEGE LAW SCHOOL
Newton Centre, Massachusetts
02159
(617) 552-4387

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QUESTION PRESENTED

Can economic harm to a property owner—standing alone—establish a violation of the Fifth Amendment, regardless of any other consideration, including whether the government regulation addresses private activity that harms other property owners and the general public?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-453

DAVID H. LUCAS

Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL

Respondent.

On Writ of Certiorari
To The South Carolina Supreme Court

BRIEF OF NUECES COUNTY, TEXAS; SCITUATE, MASSACHUSETTS CONSERVATION COMMISSION; CHATHAM, MASSACHUSETTS CONSERVATION COMMISSION; AMERICAN LITTORAL SOCIETY; CHESAPEAKE BAY FOUNDATION; COAST ALLIANCE; ENVIRONMENTAL DEFENSE FUND; NATIONAL AUDUBON SOCIETY; NATURAL RESOURCES DEFENSE COUNCIL; NATIONAL WILDLIFE FEDERATION; SOUTH CAROLINA WILDLIFE FEDERATION; DR. JOSEPH F. DONOGHUE; DR. PAUL T. GAYES; DR. JOSEPH T. KELLY; DR. ORRIN PILKEY; DR. RUTHERFORD H. PLATT AND DR. STAN RIGGS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF AMICI

Amici are a coastal county in the State of Texas, two municipal conservation commissions in Massachusetts, six

national conservation groups, two regional conservation groups, and six leading coastal scientists. For the Court's convenience, a more detailed description of each amicus appears in the Appendix. Letters from counsel for the parties consenting to the filing of this brief have been filed with the Clerk.

Amici are interested in this case because they support reasonable governmental regulation to protect public safety, health and the environment. Adoption of petitioner's theory that economic harm to him, standing alone, is sufficient to establish a violation of the Fifth Amendment would severely frustrate amici's objectives. Petitioner's proposed test would impose an enormous burden on fiscally strapped federal, state, and local governments and deter them from taking actions necessary to protect the general welfare. It also would require the public, as a condition of protecting public safety, health and the environment, to pay property owners to halt harmful activity that, as a matter of constitutional law, as well as simple fairness and efficient social policy, they have no right to conduct. Protection of the public as a whole would be severely and unjustly threatened if compensation had to be paid to individuals who engage in activities that cause harm to the public.

STATEMENT OF THE CASE

Amici rely on the statement of the case presented by respondent South Carolina Coastal Council.

SUMMARY OF ARGUMENT AND INTRODUCTION

Amici are submitting this brief in support of respondent for two purposes.[1] Our first purpose is to provide the Court

[1] Amici agree with the position of respondent, supported by the United States, that this case is not ripe because petitioner failed to pursue the additional administrative remedies available to him under the 1990 amendments to the Beachfront Management Act. Amici do not specifically address this issue because other briefs filed with the Court address it fully. If the Court agrees to remand the case to permit petitioner to exhaust his administrative remedies, it will of course be unnecessary for the Court to address the merits of the case at this time.

detailed information about the serious erosion and storm damage problems occurring on the nation's barrier islands and in South Carolina in particular. This information is intended to help the Court evaluate the threats to public safety and health and to private property associated with coastal development that led the South Carolina Legislature to adopt the coastal setback requirement in the 1988 Beachfront Management Act.

Our second purpose is to set forth the legal standards amici believe should govern the resolution of this and similar Fifth Amendment challenges to public safety, health, and environmental regulations. The Court should reject petitioner's theory, supported by certain other amici, that he is entitled to compensation based solely on a showing that he was denied "economic use" of his property. That theory contradicts the Court's frequent recognition, in a variety of regulatory contexts, that government action may not constitute a taking when it substantially reduces or even eliminates the value of private property. The proposed test of "economic viability" would produce arbitrary and irrational results inconsistent with the Fifth Amendment's basic goals of justice and fairness. It also would be difficult to apply in practice and therefore would neither clarify nor increase the predictability of the Court's "takings" analysis.

We submit that the standards the Court should apply in this and similar cases are rooted in the well-established doctrine that government may properly act to prevent a citizen from using his property in a way that injures his neighbors or the general public. Contrary to the position of the United States, common law nuisance doctrine neither explains nor limits the authority of government to act without paying compensation under the Fifth Amendment. So long as a government regulation is actually related to the prevention of a significant public harm, there is no violation of the Fifth Amendment.

Amici contend that the Court should affirm the decision of the South Carolina Supreme Court on the ground that

the court properly concluded that petitioner failed to carry his burden of demonstrating a taking in this case. At a minimum, petitioner had the duty to address not only the economic harm to him but also the public purposes of the Beachfront Management Act. Petitioner failed—indeed did not even attempt—to shoulder the necessary burden.

ARGUMENT

I. THE SOUTH CAROLINA SETBACK LAW IS A REASONABLE LEGISLATIVE RESPONSE TO THE SERIOUS PUBLIC HARMS CAUSED BY COASTAL DEVELOPMENT IMMEDIATELY ADJACENT TO AN ERODING OCEAN SHORELINE.

> "Everyone who hears these words of mine and does not put them into practice is like a foolish man who built his house on sand. The rain came down, the streams rose, and the winds blew and beat against that house, and it fell with a great crash." *Matthew* 7:26-27.

A. Development on Eroding Ocean Shorelines Creates Serious Threats to Public Safety and Health and to Private Property.

The barrier islands along the Atlantic shore from New Jersey to Florida, including the Isle of Palms, are among the most dynamic, unpredictable, and dangerous features of the nation's landscape. Located at the interface of land and sea, barrier islands are low lying, flood prone, and typically underlain by easily eroded, unconsolidated sediments. Contrary to ordinary intuition that dry land does not move, barrier islands rapidly change form, migrating both laterally and landward. As barrier islands move, the dunes behind the beach are constantly being reshaped and relocated. The driving forces in this process are the steady pounding of wind and waves, punctuated by the often dramatic impact of hurricanes and other major storms.

As the U.S. Congress found in passing the Coastal Barrier Resources Act of 1982, 16 U.S.C. § 3501 *et seq.*:

> Coastal barriers [islands] are among the most unstable land forms. Beaches, dunes, and entire islands erode and migrate as ocean currents, wind, and waves undermine and move them. Storms can wipe out whole sections of beach when they are overwashed and can just as easily close inlets as sediments are redeposited. The sands of the beaches continuously move and are redistributed.

S. Rep. No. 419, 97th Cong., 2d Sess. 1 (1982), *reprinted in* 1982 U.S.C.C.A.N. 3212, 3213.

The dynamic nature of coastal processes has become even more volatile and threatening in recent history as a result of an increase in the rate of sea level rise. *See id.* Over the last one hundred years, the sea level along the Atlantic has risen by approximately one foot.[2] While there is no scientific consensus on the causes of this trend, authorities generally predict that sea level will rise at an even faster rate over the next century.[3] Continued rapid rise in sea level will put even greater pressure on coastal barrier islands in the future.[4]

The dynamic and migrating nature of barrier islands is well-illustrated by petitioner's property itself. Data presented by the South Carolina Coastal Council at trial showed that there have been substantial shifts in the shoreline in the vicinity of petitioner's property and that the sea has inundated his property many times, often for long periods. In roughly half of the last forty years, all or part

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[2] S.D. Hicks, *Sea Level Variation for the United States 1855-1980* (National Ocean Service 1983).

[3] A recent report by the National Research Council concluded that "one hundred years from now, it is likely that sea level will be 0.5 to 1.0 meter (1.6 to 3.3 feet) higher than it is at present." National Research Council, *Sea Level Change* (1990).

[4] It is predicted that a one-foot rise in sea level will translate into a 100 to 200 foot retreat along the South Carolina shore. Kana, "The Physical Impact of Sea Level Rise in the Area of Charleston, South Carolina," in *Greenhouse Effect and Sea Level Rise* (M.C. Barth & J. Titus eds. 1984).

of petitioner's property was part of the beach or even flooded twice daily by the ebb and flow of the tide. Tr. at 84. Between 1957 and 1963, the shoreline was entirely landward of, *i.e.*, behind, petitioner's property. Tr. at 79, 81-82. Between 1963 and 1973, the shoreline was 100 to 150 feet landward of petitioner's property. *Id.* In 1973, the first line of stable vegetation was about halfway through the property. Tr. at 80.

Furthermore, the shoreline in front of petitioner's property may well move landward again and completely inundate petitioner's property once more. Tr. at 81. While the beach along this stretch of coast has been generally "accretional" since 1973, the evidence shows that the beach remains at substantial risk from erosion. Specifically, the general pattern of erosion is subject to potentially lengthy as well as dramatic reverses as migrating offshore shoals move toward the land and become attached to the shore. Tr. at 73. The property is in an inlet erosion zone and such areas are particularly prone to erosion as a result of storm surges, tidal currents, and ebb surge.[5]

The forceful action of waves, currents, and wind, abetted by the long-term rise in sea level, has made coastal erosion a serious national problem. As a recent Federal Emergency Management Agency report documented:

> From California to the Great Lakes to Cape Cod, houses built along the immediate coastline are often destroyed by a combination of caving of bluffs or erosion of beaches and dunes and flooding. Combined erosion and flooding affects all coasts but is particularly serious on barrier islands and on exposed Atlantic and Gulf Coasts and the Great Lakes. In 1971, the U.S. Army Corps of Engineers estimated that a

[5] U.S. Dep't of the Interior, *Report of the Barrier Island Work Group* 14 (1987). "Inlet shorelines move about 10 to 100 times faster than nearby oceanfront property lines." University of North Carolina Sea Grant, *Your Place at the Beach* 1 (1987).

> quarter of the national shore front (20,500 miles) was subject to significant erosion.[6]

The unprecedented growth in the nation's coastal population only increases the threat posed by erosion. About 110 million people—almost half of the nation's population—live along the coast. The Commerce Department estimates that by the year 2010, the coastal population will have grown to more than 127 million.[7]

Erosion and storms have inflicted enormous damage on the nation's coastal areas. Over the last 50 years, the Atlantic coast has faced a series of major hurricanes, resulting in over 900 deaths.[8] Erosion and storms have destroyed thousands of homes and caused billions of dollars worth of property damage. Hurricane Hugo alone, which hit South Carolina particularly hard in 1989, resulted in fifty-one deaths and $10 billion in damage.[9]

The dramatic impacts of storms on barrier islands are illustrated by the effects of Hurricane Hugo on the Isle of Palms, the site of petitioner's property. At the height of the storm, the entire Isle of Palms was completely

[6] Federal Emergency Management Agency, *Reducing Losses in High Risk Flood Hazard Areas: A Guidebook for Local Officials* F-1 (Feb. 1987). *See also* Lemonick, "Shrinking Shores: Overdevelopment Poor Planning and Nature Take Their Toll," *Time*, Aug. 10, 1987, at 38. "In the U.S. entire coastal areas are disappearing into the sea. Virtually every mile of shoreline is affected in every state that borders an ocean, as well as those on the five Great Lakes, where large chunks of waterfront property have been lost or damaged due to record-high water levels in recent years."

[7] National Oceanic and Atmospheric Admin., U.S. Dep't of Commerce, *50 Years of Population Change Along the Nation's Coasts 1960-2010*, 1 (April 1990).

[8] Federal Emergency Management Agency, *Principal Threats Facing Communities and Local Management Coordinators, A Report to the United States Senate Committee on Appropriations* 26 (April 5, 1990).

[9] *Id.* at 25.

flooded.[10] The waves and accompanying tidal surge created by the hurricane caused extensive damage to houses located along the beachfront.[11] Generally, everything on the island within 500 feet of the water—which includes petitioner's property—was either severely damaged or completely destroyed.[12]

The hazards of building in erosion areas go far beyond the obvious risks to individuals who face destruction of their dwellings and threats to their safety. Shorefront development that destroys sand dunes or otherwise disrupts the natural movement of the beach/dune system weakens the most effective defense for inland areas from storm surges. In their natural state, sand dunes act as a reservoir of sand to replace beach sand lost to the forces of ocean waves and storms and offer a protective barrier for inland properties against storm surges and winds.[13] Dunes gradually migrate in response to the changing configuration of the shore. Construction in or adjacent to the beach/dune system disrupts the dynamic equilibrium and long-term stability of the dune, drastically impeding its functions of beach replenishment and storm protection.[14]

The value of dunes as a defense against storms is well-illustrated by South Carolina's experience during Hurricane Hugo. Where dunes, rather than houses, were available to absorb the impact of waves and storm surge, damage to structures was much less than where dunes

[10] Katuna, "The Effects of Hurricane Hugo on Isle of Palms, South Carolina: From Destruction to Recovery," 8 *J. of Coastal Res.* 263-64 (Special Issue Spring 1991).

[11] *Id.*; Saffir, "Hurricane Hugo and Implications for Design Professionals and Code-Writing Authorities," 8 *J. of Coastal Res.* 25, 27 (Special Issue Spring 1991).

[12] Saffir, *supra* note 11, at 27.

[13] J. Clark, *Coastal Ecosystem Management: A Technical Manual for the Conservation of Coastal Zone Resources* 320-22, 94-95, 97-98 (1977).

[14] *Id.*

were not present.[15] Eighty-four percent of all buildings completely destroyed or removed from their foundations during the hurricane were fronted by a combination of narrow beaches and narrow dunes.[16]

Structures built on the ocean shore also create a substantial danger to landward structures and their occupants. For example, during Hurricanes Kate and Hugo, debris from exposed first-tier properties damaged a number of houses further inland.[17] In one case a roof was blown some 1000 feet inland. This "projectile damage" from the first two rows of structures is the greatest source of debris that causes damage to inland structures.[18]

A similar type of damage occurs when high waters literally lift exposed structures off their foundations and drive them back toward land. During Hurricanes Kate and Hugo, the storm surge lifted houses and moved them across streets, lagoons and sounds, sometimes as far as a mile or more.[19] During Hurricane Bob which hit the East Coast this past summer, many buildings in Massachusetts were washed off their foundations and caused extensive damage to landward and abutting buildings.[20]

Storm debris from damaged coastal structures also impedes the rescue and relief efforts of public emergency

[15] Thieler, "Quantitative Evaluation of Coastal Geomorphological Changes in South Carolina After Hurricane Hugo," 8 *J. of Coastal Res.* 187 (Special Issue Spring 1991); Stauble, "Effects of Hurricane Hugo on the South Carolina Coast," 8 *J. of Coastal Res.* 129 (Special Issue Spring 1991).

[16] Thieler, *supra* note 15, at 199.

[17] R. Clark, *Hurricane Kate. Poststorm Report No. 86-1*, 105 (Prepared for the Florida Department of Natural Resources) (1986); Coch, "Effects of Hurricane Hugo Storm Surge in Coastal South Carolina," 8 *J. of Coastal Res.* 201, 213-14 (Special Issue Spring 1991).

[18] *See* Coch, *supra* note 17.

[19] R. Clark, *supra* note 17, at 92; Katuna, *supra* note 10, at 265.

[20] *National Flood Insurance Mitigation and Erosion Management Act of 1991: Hearing before the Senate Subcommittee on Housing and Urban Affairs* 5-6 (Sept. 25, 1991) (testimony of James O'Connell, Coastal Geologist for the Massachusetts Coastal Zone Management Program).

services. Storm debris must be removed before relief can even reach some areas. In South Carolina, after Hurricane Hugo, clearing of roads for emergency vehicles took up to two weeks.[21] Storm debris can also create a problem seaward. As stated by Dr. Gayes of the University of South Carolina-Coastal Carolina College: "The presence of extensive hurricane related debris in the shallow waters off the coast poses a threat to the economy and public safety of the state."[22]

Another public danger arises from the threat to public health from pollution. Storm events commonly raise the water table on barrier islands, leading to failure of septic systems and community-wide wastewater systems.[23] Development along the Massachusetts coast affected by Hurricane Bob, for example, created serious public health problems:

> Field observations revealed that structures which were destroyed or carried off foundations, particularly on barrier beaches, deposited all the typical household chemicals and storage shed contents (drain cleaners, old petrochemicals, lawn fertilizer, paints, etc.), as well as septic system contents, into landward salt ponds. As a result, all shellfish beds and many swimming beaches were immediately closed, some indefinitely, in affected areas.[24]

Finally, development on the ocean is costly to the general public not only in terms of human life and property damage, but also as a severe drain on the public fisc. For example, the federal government's costs associated with

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[21] Dowd, "Debris Removal and Channel Shoaling," in *Hurricane Hugo One Year Later* 104 (B. Sill and P. Sparks eds. 1990).

[22] *Id.* at 107.

[23] Cook, "Hurricane Hugo vs. Critical Lifelines: Lessons Learned and Implications for the Future," in *Hurricane Hugo One Year Later*, *supra* note 21, at 76.

[24] Testimony of James O'Connell, *supra* note 20, at 6.

Hurricane Hugo, represented by disaster relief and federal flood insurance payments, amounted to nearly $2 billion ($1.6 billion for disaster relief; $364 million for flood insurance payments).[25] Approximately $750 million of this was for South Carolina.[26]

B. The South Carolina Setback Requirement is a Balanced and Prudent Response to the Serious Threats of Public Harm from Coastal Development.

The South Carolina coastal program, like that of 28 other coastal states and territories, is carried out pursuant to the Federal Coastal Zone Management program, a "federal-state partnership" designed to provide comprehensive management of our nation's coastline. The Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-64 (CZMA), sets out national objectives and guidelines and also provides funding and other incentives for the development of state coastal programs.

One of the primary goals of the CZMA is discouraging development in hazardous, erosion-prone areas immediately adjacent to the ocean shore. The CZMA, as amended in 1980, directs the National Oceanic and Atmospheric Administration (NOAA) to ensure that state coastal programs "provide for . . . the management of coastal development to minimize the loss of life and property caused by improper development in flood-prone, storm-surge, geological hazard and erosion-prone areas . . . and by the destruction of natural protective features such as beaches, dunes, wetlands, and barrier islands." 16 U.S.C. § 1452(2)(B). The House Report on these amendments specifically states that one appropriate state policy for barrier islands is "requiring all development to be a certain distance from the beach in order to allow the island to pro-

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[25] U.S. General Accounting Office, *Report to Congressional Requesters. Disaster Assistance: Federal, State, and Local Responses to Natural Disasters Need Improvement* 13 (GAO/RCED-91-43) (1991).

[26] *Id.*

vide its natural storm protective function." H.R. Rep. No. 1012, 96th Cong., 2d Sess. 43 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4362, 4387.

The federal policy of encouraging state setback requirements was reinforced by 1990 amendments to the CZMA calling upon the states to address the substantial, continuing rise in sea level. The 1990 amendments made stopping development in high-hazard areas a top priority for state coastal programs. 16 U.S.C. § 1458(a)(2). Fourteen states participating in the federal coastal zone program have now adopted beach setback laws.[27]

In response to the requirements of the CZMA, as well as to substantial public concern over the problems associated with coastal development, the South Carolina Coastal Council in 1986 established a Blue Ribbon Committee on Beachfront Management to assess the extent of the State's erosion problems and to determine how the State's beaches and dunes should be managed in the future. The Committee's March 1987 report found, among other things, that:

1. The South Carolina beach/dune system was in a state of crisis. Over 57 miles of beach, out of a total of 198 miles of Atlantic Ocean shoreline, were critically eroding.[28]

2. This erosion was threatening the continued existence of the beach/dune system and thereby threatening life and property.[29]

3. The primary causes of this crisis included a persistent rise in sea level, poorly planned development which encroaches upon the beach/dune system and a lack of comprehensive beach management planning.[30]

[27] The States with setback requirements are: Alabama, Delaware, Florida, Hawaii, Maine, Maryland, Michigan, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Wisconsin. *See generally* Hwang, "Shoreline Setback Regulations and the Takings Analysis," 13 *U. Haw. L. Rev.* 1 (1991).

[28] *Report of the South Carolina Blue Ribbon Committee on Beachfront Management* i (March 1987).

[29] *Id.*

4. The beach-dune system "protects life and property by serving as a storm barrier which dissipates wave energy and contributes to shoreline stability;" "uncontrolled and unwise development sited too close to the beach/dune system has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property."[31]

5. The Coastal Council's limited authority over the beach/dune system meant that the "Council has been unable to prevent structures from being sited unwisely close to the eroding beach and the impact area of storms and high tides."[32]

6. "A relatively minor storm in early December, 1986, closely followed by another storm on January 1, 1987, inflicted substantial damage to upland property ($20 million) and left the coast of South Carolina severely damaged and highly vulnerable to future storms."[33]

7. A retreat from the beach over a thirty year transition period, by discouraging new construction in close proximity to the beach/dune system and encouraging those who have erected structures too close to the beach/dune system to retreat from the beach/dune system, is the only practical approach to the State's coastal erosion problems.[34]

The South Carolina Legislature enacted the 1988 Beachfront Management Act to address the findings and implement the recommendations of the Blue Ribbon Committee. The Act establishes a "comprehensive, long-range beach management plan" to accomplish "a gradual retreat [of development] from the [beach/dune] system over a forty year period," S.C. Code Ann. § 48-39-260(2), extending by

[30] *Id.*

[31] *Id.* at 1, 2.

[32] *Id.* at ii.

[33] *Id.* at iii.

[34] *Id.* at iv, 2.

ten years the thirty year retreat policy advocated by the Committee.[35] The 1988 Act was approved by the Secretary of Commerce, through NOAA, as consistent with the CZMA.[36]

The Act reflected a careful balance between the need to address the problems of coastal erosion and respect for the interests of coastal property owners. Recognizing that owners of existing residences have a substantial expectation in the continued use of their property, the Act did not contemplate the immediate relocation or removal of these structures, despite the hazard they present to the general public. Rather, the Act provided only that when a habitable structure has been "destroyed beyond repair due to natural causes," the structure could not be rebuilt seaward of the setback line established by the Act. S.C. Code Ann. § 48-39-290(B)(1)(b).

The Act provided for more stringent regulation of new development. As applied to petitioner's property, the Act required that a "baseline" be set at the most landward point of erosion during the past forty years, recognizing that, at least in absence of any better information, the historical record over the last forty years provided the best available basis for predicting erosion likely to occur over the next forty years. S.C. Code Ann. § 48-39-280(A)(2). Then, in order to implement the stated policy of retreat, the Act directed that a "setback line" be established behind the baseline, calculated "at a distance which is forty times the average annual erosion rate," but "no less than twenty feet from the baseline." S.C. Code Ann. § 48-39-280(B). Habitable structures could not be built seaward of the setback line.

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[35] While the Legislature recited various different governmental objectives served by the Act, S.C. Code Ann. § 48-39-250(1), it is clear from the history of the Act as well as the methodology for setting the baseline and setback line that the predominant purpose of the Act is to "protect life and property" by minimizing storm and erosion damage. S.C. Code Ann. § 48-39-250(1)(a).

[36] 54 Fed. Reg. 7,580 (1989).

The Legislature also recognized that, in particular circumstances, this general method for identifying those areas of actual risk might not be either correct or fair. Thus, the Act provided that the baseline (and in turn the setback line) could be set at a different point whenever available data "indicate[d] that the shoreline is unlikely to return to its former position." S.C. Code Ann. § 48-39-280(A)(2). Despite the fact that petitioner attempted to belittle the harm-protection purpose of the Act by arguing that his property was more than a "football" field from the active beach, there is no indication that petitioner ever suggested to the Council that the baseline for his property should be set at a different point. Specifically, he never sought to invoke the provision of the Act that allowed him to challenge the drawing of the baseline. S.C. Code Ann. § 48-39-280(E).

II. ECONOMIC HARM, STANDING ALONE, IS NOT SUFFICIENT TO DEMONSTRATE A VIOLATION OF THE FIFTH AMENDMENT.

Petitioner's theory at trial was that a showing of economic harm to him was sufficient to demonstrate a violation of the Fifth Amendment.[37] However, the Court's prior decisions "uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking.' " *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 131 (1978). Petitioner's theory, which was adopted by no member of the divided South Carolina Supreme Court, is flatly inconsistent with a common sense understanding of government's overriding responsibility to protect citizens from risks to their safety and other harms.

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[37] For example, during the trial when counsel for the Coastal Council attempted to explain the public harms caused by coastal development and how the Act addresses these harms, counsel for petitioner objected that evidence of the purpose of the Act was irrelevant to his client's claims for damages: "[I]f he's trying to show a basis for why they passed the Act, we haven't raised an issue with the Act. We haven't raised an issue as to its validity; only the price tag associated with it." Tr. at 95.

A. There is No Support for the Proposed *Per Se* Rule.

The brief of the United States ably describes a wide variety of government actions that substantially reduce or destroy property values without creating a right to compensation under the Fifth Amendment. Brief of the United States, at 13-15; *see also Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 491 n.14 (1987) (collecting cases). Recently, in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), the Court reviewed a floodplain ordinance that allegedly deprived the owner of "all use" of his property. The Court implicitly rejected the proposition that this allegation by itself could establish a violation of the Fifth Amendment, because it remanded the case for consideration of whether, even if the ordinance denied the owner all use, the ordinance could be justified as a safety measure. *Id.* at 312.

The Court has found adverse financial effect on a property owner insufficient to demonstrate a "taking" in a variety of regulatory contexts. In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), the Court concluded that if the Environmental Protection Agency disclosed confidential commercial data submitted by a manufacturer, the company would be completely deprived of its property interest in its trade secrets. Nonetheless, the Court found no taking because the company had no "reasonable expectation" that its property interest in the confidentiality of its trade secrets would be protected. *Id.* at 1006. Similarly, in *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 225 (1986), the Court recognized that Federal legislation imposing a new liability on an employer seeking to withdraw from a pension fund "completely deprives [the] employer of whatever amount of money it is obligated to pay to fulfill its statutory liability." Nevertheless, the Court rejected the claim that the legislation effected an unconstitutional taking. *Id.*

Even in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), which represents perhaps the Court's most searching examination of a government regulation under the Fifth

Amendment, the Court did not hold that the impact of a regulation on a landowner is the only relevant factor. The Court's conclusion in that case—"that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights," *id.* at 414,—demonstrates that the purpose of the regulation, as well as its financial impact, is relevant in takings analysis.

Apart from the force of precedent, petitioner's proposed *per se* rule is nonsensical. According to petitioner's view, the governmental purpose of a regulation would be a potentially dispositive factor only so long as the property owner retains some use of the property, but it would become irrelevant if the regulation causes the property to lose "all value." This approach would lead to totally arbitrary results based on minute differences in the economic effect of regulations on different property owners. *Compare* Brief *Amicus Curiae* of Institute for Justice at 11-13.

Contrary to the position of certain other amici, a regulatory action, even if it denies an owner "economic use" of his property, is hardly equivalent to an actual physical invasion of property. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (permanent, physical occupation of property is *per se* a taking). As the Court emphasized in *Loretto*, physical invasions are "special," *id.* at 432, and represent "the most serious form of invasion of an owner's property interests" insofar as they effectively destroy every strand in the bundle of property rights. *Id.* at 435. That is clearly not the result in this case or in governmental regulatory actions generally. Petitioner retains the right to exclude others from the property—"one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987); *see also Keystone*, 480 U.S. at 488 n.18. Furthermore, the evidence showed that the Act by no means deprived petitioner of all use of his property but rather allowed him to place a temporary trailer, a tent or a walkway on the

property. *Compare Hall v. Board of Envtl. Protection*, 528 A.2d 453 (Me. 1987) (denial of permit to construct on an ocean dune not a taking where owner permitted to place motorized trailer on property).

Petitioner and several amici are also incorrect when they suggest that *Agins v. City of Tiburon*, 447 U.S. 255 (1980), established that a property owner is automatically entitled to compensation if a regulation denies economically viable use of property. The *Agins* decision itself demonstrates that economic impact is not the only relevant factor. For example, the Court said that "no precise rule determines when property has been taken," but rather "the question necessarily requires a weighing of public and private interests." *Id.* at 260-61. *See also id.* at 262 (the "benefits must be considered along with any diminution in market value that the appellants might suffer"). In no other case has the Court read *Agins* as establishing a *per se* test and the Court has never declared a government regulation unconstitutional based on that standard.[38] Finally, less than a year before its *Agins* decision the Court first articulated the three-factors which have provided the framework for the Court's takings analysis to the present day. *See Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *Penn Central*, 438 U.S. at 124-28. It is literally unbelievable that the Court, in its rather short, unanimous *Agins* decision, would have adopted a new, independent test for takings analysis without saying so.

Lastly, apart from the substantive reasons for rejecting petitioner's proposed test, a *per se* rule based on "economic viability" offers none of the advantages that favored

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[38] To be sure, the Court has indicated that proof that a regulation does *not* deny an owner economic use of his property is sufficient to *defeat* a facial takings challenge. *See Hodel v. Indiana*, 452 U.S. 314, 335 (1981); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295-96 (1981). But the conclusion that a regulation is not on its face a taking because it allows the landowner some economic use of property is a far cry from the proposition that denial of such use is sufficient to establish a taking claim regardless of any other consideration.

adoption of a *per se* rule for permanent, physical occupations of property. The Court concluded in *Loretto* that a *per se* rule for permanent, physical invasions avoided "otherwise difficult line drawing problems" and involved "relatively few problems of proof." 458 U.S. at 436-37. By contrast, the proposed economic viability test would require detailed evaluations of claims based on the amount and timing of the owner's investment in property and the uses to which the property is or might be put. Complex factual issues would be presented concerning whether a particular enterprise is or is not profitable, and to what degree its asserted lack of profitability is attributable to government regulation or to any of a myriad of other likely causes.

B. The Proposed Rule Would Contradict the Authority of Government to Regulate Property Use to Prevent Harm to Other Property Owners and the General Public.

In addition to lacking any affirmative support, the proposed *per se* rule should be rejected because it is inconsistent with the recognized authority of government, without paying compensation, to prevent property owners from using their property in a fashion that harms other property owners or the general public. "[A]ll property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community." *Mugler v. Kansas*, 123 U.S. 623, 665 (1887). Since no individual has a right to use his property in a way that harms others, the government has not taken anything when it asserts its power to prevent public harms. *See Keystone*, 480 U.S. at 491 n.20.

The principle that property ownership is limited by the rights of other landowners and the public at large is inherent in the very concept of property. In *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 84-85 (1851), the Massachusetts Supreme Court stated:

> We think it is a settled principle, growing out of the nature of well ordered civil society, that every holder

> of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property. . . . Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.

See also Commonwealth v. Tewksbury, 52 Mass. (11 Met.) 55 (1846).

The Court has repeatedly upheld harm-prevention regulations against attack under the Fifth Amendment, regardless of the magnitude of the landowner's economic loss. In *Mugler*, 123 U.S. at 657, the Court rejected a Fifth Amendment challenge by the owner of a Kansas brewery to a prohibition against the manufacture of beer even though it rendered the property of "little value." In *Miller v. Schoene*, 276 U.S. 272 (1928), the Court held that the Fifth Amendment did not require the State of Virginia to pay compensation to the owner of cedar trees ordered destroyed to prevent a disease from spreading to nearby apple orchards. In *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 596 (1962), the Court upheld a town regulation that barred continued operation of an existing sand and gravel operation in order to protect public safety even on the assumption that it "would confiscate the entire remaining utility of [the] properties." *See also Andrus v. Allard*, 444 U.S. 51 (1979) (upholding prohibition against selling artifacts made with feathers from endangered birds in order to protect endangered wildlife).

The Brief of the United States contains numerous other examples in which government authority to diminish or destroy property values in order to prevent public harms

has been upheld. These include destruction of "unwholesome food," condemnation of an unsafe building, or disposal of diseased poultry. Brief of the United States at 14 & n.3.

Contrary to the suggestion of the United States, however, government authority to prevent public harms, even if it diminishes or destroys property values, is not limited to these archaic examples. *See Keystone*, 480 U.S. at 488, citing *Block v. Hirsh*, 256 U.S. 135, 155 (1921). When the government imposes new air pollution regulations, an entire factory may have to shut down. Although not faced with a taking challenge, this Court in *EPA v. National Crushed Stone Ass'n*, 449 U.S. 64 (1980), did not hesitate to reject a claim that economic hardship justified an exemption from water pollution regulations. Likewise, new regulations for solid waste have led to the closure of many existing landfills.[39] While no one doubts the seriousness of the economic hardship these types of regulations impose, it cannot plausibly be asserted that compensation is due those whose activities are determined, based on available scientific and environmental information, to threaten the nation's well being.

While government regulations commonly proscribe particular activities to prevent public harm, the logic of the Court's decisions applies equally when, as in this case, the harm arises from use of land for any permanent development. This is confirmed by the Court's decision in *First English*, where the Court remanded the case to the lower courts to consider whether an ordinance prohibiting any permanent structures in a floodplain was a valid safety ordinance. *See id.*, 482 U.S. at 325-26 (Stevens, J., dissenting on other grounds) ("[I]n order to protect the health and safety of the community, government . . . surely may [without paying compensation] restrict access to hazardous areas—for example, land on which radioactive materials have been discharged, land in the path of a lava flow from

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[39] Office of Technology Assessment, *Facing America's Trash: What Next for Municipal Solid Wastes* 3 (OTA-0-424) (1989).

an erupting volcano, or land in the path of a life-threatening flood."); Brief of the United States at 14 (recognizing authority of government without paying compensation to prohibit "siting a residence or other building on a steep slope or other unsafe location").

The rule that a person cannot use his property to harm others furthers efficient public policy and is rooted in fundamental principles of fairness. Restricting private activity that imposes external costs on other property owners or the community at large generally yields an efficient result. And when a person uses his private property for his benefit in a way that harms the community it is far more fair to require the owner to cease his offending activity than to force the public to choose between allowing the activity to continue or paying the owner to cease.

III. GOVERNMENT AUTHORITY TO PROTECT THE PUBLIC FROM HARM WITHOUT PAYING COMPENSATION IS NOT LIMITED BY COMMON LAW NUISANCE RULES.

While the United States and certain other amici acknowledge that property owners have no constitutionally protected right to use their property to harm others, they argue that this principle should be confined to a narrow "nuisance exception." The United States contends that this "exception" must not "depart from the common law origins of nuisance" and that it can only be invoked for "an established nuisance-prevention or public health and safety purpose, in terms of the nature, degree, proximity and context of the harm concerned." Brief of the United States at 13, 17.

The United States is wrong, first, in suggesting that the character or purpose of a governmental regulation constitutes some type of "exception" or defense in takings cases. The character or purpose of a governmental regulation is an essential consideration in determining whether property has been taken in the first place. *See, e.g., Keystone*, 480 U.S. at 488-89; *Kaiser Aetna*, 444 U.S. at 175. As the Court stated in *Keystone*, citing *Mugler* and similar

precedents, "the nature of the State's interest in the regulation is a critical factor in determining whether a taking has occurred, and thus whether compensation is required." 480 U.S. at 488.

More importantly, contrary to the position of the United States, the scope of government authority to prevent public harms should not be defined by reference to the common law of nuisance. Indeed, the Court already has explicitly rejected the contention that government power to act without paying compensation depends on whether the prohibited activity is a common law nuisance. *See Goldblatt*, 369 U.S. at 593; *Miller v. Schoene*, 276 U.S. at 280. The Court has repeatedly upheld regulations designed to prevent public harms that would not be deemed nuisances at common law. *See, e.g., Mugler* (operation of brewery); *Andrus v. Allard* (sale of endangered species artifacts). State courts have reached the same result. *See, e.g., Durham v. Cotton Mills*, 141 N.C. 615 (1906) (rejecting nuisance claim against industrial polluter because of insufficient evidence of injury to meet common law standard of proof, but upholding under the Fifth Amendment statutory prohibition against the pollution); *State v. Wheeler*, 44 N.J. Law 88, 91-92 (1882) (anti-pollution requirement is not a taking despite lack of proof of injury because "[s]uch acts are plainly within the police power of the legislature, which power is the mere application to the whole community of the maxim "sic utere tuo, ut alienum non laedas' ").[40]

This conclusion is entirely consistent with the language and history of the Fifth Amendment. The takings clause was included in the Bill of Rights to address concerns about actual physical appropriations of private property,[41] and the Court did not even hold that a regulatory action could constitute a taking in violation of the Fifth Amendment until 1922. *See Pennsylvania Coal v. Mahon*. Thus,

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[40] "Use your own property in such a manner as not to injure that of another."

[41] *See* Note, "The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment," 94 *Yale L. J.* 694 (1985).

it is questionable whether the drafters even intended for the Fifth Amendment to reach purely regulatory activities. In any event, we are aware of no evidence, and the United States certainly offers none, that the drafters believed that the common law of nuisance should guide the Court's application of the Fifth Amendment.

Apart from precedent and history, reliance on the common law of nuisance as a guide is not a practical approach. First, grafting the common law of nuisance onto the Fifth Amendment would make takings analysis, an already opaque field of the law, even murkier. "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.' It has meant all things to all men, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie." W.L. Prosser, *Law of Torts* 571 (1971). The Court itself has noted that "nuisance concepts" are "often vague and indeterminate." *City of Milwaukee v. Illinois and Michigan*, 451 U.S. 304, 317 (1981).

Furthermore, while the United States states that government regulation must not depart from "common law origins," the examples provided by the United States contradict this requirement. On the one hand, the United States argues that the government may properly regulate the manufacture and distribution of drugs, despite the fact that modern government regulation of drugs has little if any connection to the law of nuisance. On the other hand, the United States contends that protection of the "natural environment" would fall outside the scope of its proposed "nuisance exception" even though nuisance law provided the original basis for legal actions to prevent harm to the environment. *See, e.g., New York v. New Jersey*, 256 U.S. 296 (1921) (nuisance action to prevent water pollution); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) (nuisance action to prevent air pollution); *see generally* Blackstone, *Commentary on the Laws of England* 218 (nuisance includes "to corrupt or poison a watercourse"). The United States' selective application of the law of nuisance is based less on fundamentals of legal doctrine than on a simple

listing of those types of regulations the United States believes, as a matter of policy, should or should not be enforced without a requirement of compensation.

Furthermore, the strict causation requirements of nuisance law would be a totally inappropriate limitation on the authority of the government to prevent public harms. For example, a variety of chemical substances produced in this country are known to cause cancer. However, linking a particular individual's illness to one of several potential chemical agents and to a particular manufacturer is nearly impossible under traditional requirements for proof of causation.[42] Similarly, it is well established that filling wetlands in a floodplain increases floodpeaks and increases the risk of injury to people and property downstream.[43] *See also Rowe v. Town of North Hampton*, 553 A.2d 1331, 1335 (N.H. 1989) ("no taking occurs where the public policy advanced by a regulation is particularly important and the landowner's action would substantially change the essential natural character of the land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others") (internal quotations omitted). But linking the effects of a particular flood event to a particular encroachment on wetlands is nearly impossible. The very purpose of many of the nation's complex regulatory programs is to deal with widespread public harms that are difficult to address fairly and efficiently through private litigation. An interpretation of the Fifth Amendment that would recognize only those harm-prevention measures already recognized at common law would bind government in an archaic straitjacket.

Lastly, reliance on the common law of nuisance to determine when the government can justifiably act to prevent public harm without paying compensation would

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[42] Food and Drug Administration, *Chemical Carcinogens: A Review of the Science and its Associated Principles*, 50 Fed. Reg. 10,372, 10,379 (1985).

[43] U.S. Environmental Protection Agency, *America's Wetlands: Our Vital Link Between Land and Water* 4 (Feb. 1988).

embroil the courts in difficult policy judgments that the legislative branch should make in the first instance. Modern resource and land use management programs often involve complex relationships to which the essentially ad hoc, site-specific nature of nuisance law is ill-suited. As the Court stated in *City of Milwaukee*, 451 U.S. at 325:

> The invocation of federal common law. . . is particularly inappropriate in areas as complex as water pollution control. As the District Court noted: "It is well known to all of us that the arcane subject matter of some of the expert testimony in this case was sometimes over the heads of all of us to one height or another. . . ." Not only are the technical problems difficult . . . . but the general area is particularly unsuited to the approach inevitable under a regime of federal common law. Congress criticized past approaches to water pollution as being "sporadic" and "ad hoc," apt characterizations of any judicial approach applying federal common law.

See also Harrison v. Indiana Auto Shredders Co., 528 F.2d 1107, 1120 (7th Cir. 1976).

Contrary to the view of the United States, tying government authority to prevent public harms to nuisance doctrine is not necessary to avoid evisceration of the Fifth Amendment. As the South Carolina Supreme Court explicitly recognized in this case, it is not sufficient under the Fifth Amendment that a regulation was enacted to serve the general public welfare. The "public use" requirement in the takings clause of the Fifth Amendment requires that the government act for a "public" purpose, whether or not compensation is paid. The power of government to enforce regulations without payment of compensation is necessarily based on a narrower foundation.

Not every harmful external effect of property use will support restrictions that severely limit potential uses of the property. A claimant might support a takings claim by demonstrating that the harms caused by the proposed use of the property, individually and in combination with other

activities, are too trivial or insignificant to support the restriction. Moreover, while the courts owe substantial deference to legislative judgments, they could perhaps review the background and character of a harm-prevention regulation to ensure that the harms that the regulation addresses are not mere pretext. *Compare First English*, 482 U.S. at 327 (Stevens, J., dissenting on other grounds) (claimant must "allege some sort of improper purpose or insufficient justification in order to state a colorable federal claim for relief").

IV. PETITIONER FAILED TO CARRY HIS BURDEN OF DEMONSTRATING A TAKING IN THIS CASE.

If the record in this case addressed all of the relevant considerations, amici are confident that the Court would conclude that the South Carolina setback requirement does not effect a taking in violation of the Fifth Amendment. The public dangers of development on the ocean shore are both real and significant. Moreover, it is plain from the discussion in Section I of this Brief and the history of the Beachfront Management Act that the South Carolina Legislature was genuinely and properly concerned about the public harms caused by development adjacent to eroding ocean shorelines.

However, the Court need not reach these issues because it should affirm the decision of the South Carolina Supreme Court on the narrower ground that petitioner failed even to attempt to establish the necessary elements of a taking. Petitioner did, of course, introduce evidence concerning the economic effect of the regulation on him. But, for the reasons discussed above, petitioner was required to address not only the harm to himself but also the harm to the public the setback requirement is intended to avoid. Because petitioner failed to address the latter part of the equation, his claim fails as a matter of law.

While certain amici assert, without explanation, that the Council should bear the burden of justifying the setback requirement, that assertion is plainly wrong. The Court has only recently reaffirmed that the claimant bears the

burden in a takings challenge. *See Keystone*, 480 U.S. at 485 (application of Court's takings analysis "demonstrates that [claimants] have not satisfied *their* burden of showing that the Subsidence Act constitutes a taking") (emphasis added). *See also Goldblatt*, 369 U.S. at 596 ("Our past cases leave no doubt that appellants had the burden on 'reasonableness.' ") As discussed above, *see* page 19, the character or purpose of a governmental action is not a type of defense but rather "is a critical factor in determining whether a taking has occurred" in the first place. *Keystone*, 480 U.S. at 488 (citing *Penn Central*). Because the Fifth Amendment provides no protection for uses of private property that are harmful to others, a person who has been prohibited from engaging in such an activity cannot complain that he has been denied any right protected by the Amendment. Accordingly, in order to demonstrate that his property was taken, petitioner had to at least address whether the coastal setback requirement was a reasonable measure designed to safeguard public safety and prevent other public harms.

Finally, assigning the burden of proof to the claimant is consistent with the usual presumption in favor of the constitutionality of legislative acts, a presumption that applies to takings claims. *See Goldblatt*, 369 U.S. at 594 (citing "the usual presumption of constitutionality" that applies to statues attacked under the Fifth Amendment); *see also First English*, 482 U.S. at 327 (Stevens, J., dissenting on other grounds) ("the strong presumption of constitutionality that applies to legislative enactments certainly requires one challenging the constitutionality of an ordinance" to demonstrate that it is not a valid harm-prevention measure).

In this case, petitioner did not even attempt to demonstrate that the setback requirement is not a valid measure to prevent harm to others and the public. Petitioner did not challenge the Legislature's conclusions that coastal erosion was a serious problem, that additional development along the shore exacerbated risks to life and property, and that the setback requirement was a reasonable and proportioned response to the problem. Furthermore, petitioner did not challenge the methodology for establishing the setback line in the Beachfront Management Act. While the Act provided for use of a different baseline whenever it could be demonstrated that "the shoreline is unlikely to return to its former position," petitioner never bothered to suggest to the Coastal Council that the setback line affecting his property should be set at a different point.

The only evidence introduced by petitioner remotely related to the reasonableness of the legislative objectives was that the Isle of Palms was generally accretional, that some development had taken place on lots adjacent to petitioner's property, and that at present there is an extensive beach area in front of petitioner's property. This evidence simply did not address the threat posed by long-term sea-level rise, the unpredictability of erosion along the shoreline, and the need for the margin of safety provided by the Act to protect against major storms. And in view of the fact that the Act explicitly provided for adjustment of the baseline, and the fact that petitioner failed to avail himself of that opportunity, petitioner is barred from arguing in this case that location of the setback was unreasonable as applied to him.

Based on the record presented to the trial court, the South Carolina Supreme Court was entitled to rely on the legislative findings in the Act to conclude that the Act was a "reasonable" and "proportionate" response to a "serious" public harm. Cert. Pet. App. at 13. Contrary to the view of petitioner, the court's decision does not reflect blanket acceptance of the legislative judgment. Nor did the court suggest that any legitimate police power regulation would not constitute a taking. It expressed no unwillingness to examine the Legislature's factual findings, but noted only that petitioner had failed to challenge them. Absent any effort by petitioner to even address the findings in the Act or the methodology the Legislature selected, the court properly concluded that petitioner failed to demonstrate a taking in this case.

CONCLUSION

For the foregoing reasons, amici respectfully urge the Court to remand the case to allow petitioner to exhaust his administrative remedies or, in the alternative, to affirm the judgment of the South Carolina Supreme Court.

Respectfully submitted,

NATURAL RESOURCES DEFENSE COUNCIL
SARAH CHASIS
40 West 20th Street
New York, New York 10011
(212) 727-4423

NATIONAL AUDUBON SOCIETY
PETER A.A. BERLE*
JOHN D. ECHEVERRIA
950 Third Avenue
New York, New York 10022
(212) 546-9100

*Counsel of Record for Amici Curiae

NUECES COUNTY
CARLOS VALDEZ
NUECES COUNTY ATTORNEY
901 Leopard Street
Corpus Christi, Texas 78401
(512) 888-0286

NATIONAL WILDLIFE FEDERATION
GLENN P. SUGAMELI
1400 16th Street, N.W.
Washington, D.C. 20036
(202) 797-6865

ENVIRONMENTAL DEFENSE FUND
TIM SEARCHINGER
257 Park Avenue South
New York, New York 10010
(212) 505-0606

CHESAPEAKE BAY FOUNDATION
ANN POWERS
162 Prince George Street
Annapolis, Maryland 21401
(301) 261-2350

Of Counsel:

HOPE BABCOCK
GEORGETOWN LAW CENTER
600 New Jersey Avenue,
Washington, D.C. 20001
(202) 662-9481

ZYGMUNT J. B. PLATER
BOSTON COLLEGE LAW SCHOOL
Newton Centre, Mass. 02159
(617) 552-4387

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APPENDIX

APPENDIX

Nueces County is a subdivision of the State of Texas located on the Texas Gulf coast. There are 21.5 miles of barrier island beaches within Nueces County located on Mustang and North Padre Islands. In 1973, Nueces County exercised the local option under the Texas Dune Protection Act (Texas Natural Resources Codes, Section 63) and established a dune protection line located 1,000 feet landward of the mean high tide line. Under the terms of the Dune Protection Act all activities which "lowered the elevation below the 100 year flood elevation, or affected vegetation" were required to receive a permit from the Commissioners' Court. As a matter of policy, the Nueces County Commissioners' Court has declined to issue permits for structures located on the main dune line, and has instead encouraged applicants to locate their construction landwarrd of the principal dune line. The Texas General Land Office has supported this position in critical dune areas. To date all applicants have complied with this practice.

The Scituate Conservation Commission, under State Statute (General Laws, Chapter 131, section 40) and the Town of Scituate Code of Bylaws (Chapter 19, Code of Bylaws), is charged with reviewing all projects which have the potential to alter resource areas protected by these regulations within the Town of Scituate, Massachusetts. These projects include many in the coastal area which are in active erosion zones, most particularly barrier beaches. The coastline in Scituate includes 10 designated barrier beaches, three of which are federally designated and two of which are designated habitat areas. These coastal landforms are subject to severe erosion and extensive damage during large storm events. Those that are developed are subject to overwash conditions which make roads impassable due to flooding, sediment deposit, and transport of debris.

The Conservation Commission of Chatham, Massachusetts is mandated by state law (General Laws, Chapter

131, section 40) and the Chatham Wetlands Protection Bylaw to administer wetlands protection programs, including development permits. As a coastal community with 7300 parcels of land and approximately 9000 residents, the Commission is concerned about erosion damage and public expense resulting from storms, flooding, and excessive building.

The American Littoral Society was founded in 1961 with the goal of encouraging the study and conservation of marine life and its habitat in the coastal zone. The Society has about 9000 members, residing in all coastal states. Among the issues of special interest to the Society and its members are: coastal land use as it affects habitat and water quality, beach access, and living marine resources. The Society has six regional offices, in addition to headquarters at Sandy Hook, Highlands, New Jersey and a professional staff of 10.

The Chesapeake Bay Foundation is a non-profit environmental organization dedicated to the restoration and protection of the Chesapeake Bay and its tributaries. Incorporated in the state of Maryland, it has offices in Maryland, Virginia and Pennsylvania, and over 83,000 members in all fifty states and twelve foreign countries. Chesapeake Bay is the largest estuary in the United States and biologically one of the most productive systems in the world. More than 2,700 species of plants and animals inhabit the Chesapeake and its shoreline. The Bay watershed, or drainage basin, contains over 64,000 square miles in six states, and includes over a million acres of wetlands which are critical to the health of the Bay. The value of the Bay to the economies of nearby states is estimated to be in the billions of dollars. In addition, the Bay region is home to over 13 million people, with an additional several million expected in the next ten to fifteen years.

The Coast Alliance is a national non-profit public interest group dedicated to raising public awareness about our priceless coastal resources. Composed of concerned activists across the United States, the Coast Alliance provides

information on activities affecting the nation's coasts. Over the years, the Alliance has sought to increase public understanding of the risks that unwise shoreline development poses to the environment, public safety and the federal Treasury. The Alliance has published reports, articles and books on the topic, and continues to work to educate citizens, lawmakers and government officials about the need to protect humans, tax dollars and the coastal ecosystem from development in hazardous areas along the coasts.

The Environmental Defense Fund, Inc. (EDF) is incorporated as a non-profit corporation under the laws of New York. EDF is a national environmental advocacy organization staffed by scientists, economists and lawyers, with more than 200,000 members. Founded by university scientists in 1970 because of their concern with the pesticide DDT, EDF's environmental efforts have included the protection of America's coastal waters for more than twenty years. EDF has worked to minimize threats to property and human life on coastal barrier islands and to preserve their ecology by allowing the natural process of erosion and accretion to take place. Its staff and Board members have served on numerous advisory committees to the Environmental Protection Agency, the National Academy of Sciences, the Army Corps of Engineers and state and local agencies. They have played instrumental roles in shaping federal and state environmental policies that frequently involve limitations on profitable uses of property when necessary to protect against serious public harm.

The National Audubon Society (Audubon) is a nonprofit, national conservation organization with more than 550,000 members, many of whom are affiliated with one of Audubon's 500 local chapters. The mission of Audubon is to effect wise public policy for the environment, especially in major issues that bear on wildlife and wildlife habitat. Audubon plays an active role in a variety of issues that could be significantly affected by the outcome of this case, including wise use of rivers and water resources, conservation of wetlands, and protection of endangered species.

Natural Resources Defense Council (NRDC) is a non-profit membership organization dedicated to protecting our nation's natural resources. NRDC has offices in New York, Washington, D.C., San Francisco, Los Angeles, and Honolulu. NRDC has worked for over 15 years for the protection of coastal areas and has played an active role in the enactment and implementation of federal and state legislation designed to protect the coast, including the Coastal Zone Management Act and the Coastal Barrier Resources Act. NRDC has over 100,000 members nationwide.

The National Wildlife Federation is the nation's largest, not-for-profit conservation education organization dedicated to the wise management of the natural resources of the world. Since 1980, National Wildlife Federation has been working at the national, regional, and local level to encourage the protection and preservation of fragile coastal and marine ecosystems through sensible land use management practices.

The South Carolina Wildlife Federation (Federation) is a membership organization dedicated to the wise use and conservation of natural resources. An affiliate of the National Wildlife Federation, the Federation is headquartered in Columbia, South Carolina and has approximately 7,000 members. The Federation has been active in South Carolina's coastal management process, participating in the promulgation of Coastal Council regulations, commenting on permit applications, and exercising other opportunities for public input into the regulatory process.

Dr. Joseph F. Donoghue is an Associate Professor of geology at Florida State University and director of the Sedimentologic Research Lab. His research encompasses coastal and barrier island processes, long-term and short-term response of coastal features to sea level rise, the effects of storms, and the marine geology of the continental margin. This research has been funded by numerous federal and state agencies. He has an extensive list of journal publications and technical reports on coastal geologic subjects.

Dr. Paul T. Gayes serves as Director of the Center of Marine and Wetland Studies at University of South Carolina-Coastal Carolina College and has been actively engaged in coastal geological studies. He is a member of the U.S. Working Group to the International Geologic Correlation Programe-Project 274; Quaternary Coastal Evolution and has published on relative sea level and coastal change.

Dr. Joseph T. Kelly is the Director of the Marine Geology Division of the Maine Geological Survey and an Adjunct Professor of Geology at the University of Maine. Dr. Kelly participated in drafting Maine's sand dune regulations, which preclude rebuilding following storm destruction or development in high hazard areas along the coast. Dr. Kelly has a Ph.D. in Geology from Lehigh University and has worked on issues relating to sediment transport in the coastal area for his entire professional career.

Dr. Orrin Pilkey is James B. Duke Professor of Geology at Duke University, Durham, NC and Director of the Duke University Program for the Study of Developed Shorelines. He has published more than 100 research papers and is co-author of *The Beaches are Moving: the Drowning of America's Shoreline*. He has also co-edited and co-authored 16 books in the Duke University Press "Living with the Shoreline" series about the coasts of various states including South Carolina.

Dr. Rutherford H. Platt is Professor of Geography and Planning Law at the University of Massachusetts, in Amherst and a member of the Illinois Bar. He has extensively worked with legal problems of coastal, floodplain, and wetland management and is the author of many books and articles on those topics. In particular, he is the author of a new text entitled *Land Use Control: Geography, Law and Public Policy* (Prentice-Hall, 1991) and a cover article in the November, 1991 issue of *Environment* on coastal erosion (Platt, Beatley, and Miller, "The Folly at Folly Beach and Other Failings of U.S. Coastal Erosion Policy").

Dr. Stan Riggs has been Professor of Geology since 1967 at East Carolina University (ECU) in Greenville, North Carolina, where he helped start the ECU Department of Geology and founded the Institute of Coastal Marine Resources. His broad-based research has focused on coastal and estuarine systems in North and South Carolina.

(33)

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October Term, 1991

DAVID H. LUCAS,

Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

On Writ Of Certiorari To The Supreme Court Of South Carolina

BRIEF *AMICI CURIAE* OF SIERRA CLUB, THE HUMANE SOCIETY OF THE UNITED STATES, AND THE AMERICAN INSTITUTE OF BIOLOGICAL SCIENCES IN SUPPORT OF RESPONDENT

LAWRENCE N. MINCH
Counsel of Record
CAROLE L. MORRELL
LILLICK & CHARLES
Two Embarcadero Center
San Francisco, CA 94111
(415) 984-8200

Attorneys for Amici Curiae

Of Counsel:

LAURENS H. SILVER
SIERRA CLUB LEGAL DEFENSE FUND
180 Montgomery Street
Suite 140
San Francisco, CA 94104

CHARLES M. CHAMBERS
Counsel
AMERICAN INSTITUTE OF BIOLOGICAL SCIENCES
730 11th Street, N.W.
Washington, D.C. 20001-4521

February 3, 1992

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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INTEREST OF AMICI CURIAE

Amici are three nonprofit organizations with expertise about the environment who are concerned with protecting it from damage, often irreversible, caused by man. We submit this brief to explain why we believe that the South Carolina Beachfront Management Act is necessary for the protection of public health, safety and the environment and to show that the views expressed in the Brief for the United States fail to accord proper deference to the state legislature's judgment.

The Sierra Club is a national conservation organization having approximately 600,000 members, of whom about 4200 belong to the South Carolina Chapter. The Sierra Club was organized in 1892 for purposes including the exploration, enjoyment, and preservation of scenic and natural resources and to enlist public interest and cooperation in the protection of such resources.

The Humane Society of the United States is the largest animal protection organization in the nation, with more than 1.5 million members and constituents nationwide. In addition to ensuring the humane treatment and protection of animals, the Humane Society is dedicated to preserving habitat upon which the survival of wildlife often depends.

Founded in 1947 as an operating component of the National Academy of Sciences, the American Institute of Biological Sciences (AIBS) is now an independent federation of 47 scientific societies representing more than 80,000 biologists, students and others concerned with the life sciences. AIBS' mission is to address important public policy issues in the life sciences, including environmental, medical and agricultural issues. It provides interdisciplinary advice to government on topics related to global biological diversity.

Pursuant to Supreme Court Rule 37, this brief is filed with the consent of all parties. Letters of consent from counsel have been filed with the Clerk.

STATEMENT

The South Carolina Coastal Council, the respondent, is a state agency created to manage South Carolina's coastal resources. The statutes which it is responsible for implementing were enacted in large measure to implement federal coastal protection policies and to qualify South Carolina's program for federal funds. The history of this program, at both the federal and state level, demonstrates that coastal erosion in South Carolina presents an immediate and serious threat to public health, safety, and the environment and that restrictions on development of oceanfront property, such as those adopted by South Carolina, are the only feasible response to this threat. A ruling by the Court in favor of petitioner here will seriously undermine the ability of South Carolina and the other coastal states to protect their citizens.

1. The Threat to Public Health, Safety and the Environment

Erosion poses serious dangers to lives and property along the South Carolina coast and inland. Unwise coastal development destroys the beaches and the dunes, leaving coastal communities more vulnerable to storm damage and causing irreparable harm to the environment.

The beach/dune system provides long-term stability against the forces of erosion and a protective barrier against storm surge. Structures built on the beach or dune destroy this stability and accelerate the erosion process, both where the building occurs and elsewhere on the coast.[1] Structures built too close to the beach in areas

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[1] In 1971 the Army Corps of Engineers estimated that 20,500 miles (roughly 18%) of the U.S. shoreline was experiencing significant erosion. Continued development is worsening

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subject to erosion will eventually be on the beach as the shoreline retreats under them. Erosion up to and underneath structures undermines them and leads to eventual collapse.[2] When this occurs, not only does the protective frontal dune disappear, but it becomes impractical, if not impossible, for the community to rebuild the dune.[3]

The threat of severe storms to public health, safety and the environment goes far beyond the obvious risk to individual oceanfront property owners who face the destruction of their dwellings and threats to their individual safety. Persons who attempt to wait out a storm on the oceanfront risk the lives of public safety personnel inevitably sent to rescue them. Other public dangers arise when sewage connections to first tier dwellings are severed and septic systems are scoured and uncovered, spreading contamination on shore throughout the flood zone and immediately offshore to shellfish beds.[4] Storm-induced erosion, exacerbated by inappropriate first tier development, ruptures water supply lines, causing salt

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this hazard. *National Flood Insurance Program, 1989: Hearings Before the Subcomm. on Policy Research and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 101st Cong., 1st Sess. 428 (1989) (statement of Dr. Rutherford H. Platt).

[2] *See id.*

[3] Beach nourishment (trucking in huge quantities of sand to replace what has been eroded) is extremely costly. Beach nourishment generally costs around $1 million per mile of beach and must be replicated every three to ten years. *See* Jones, *Economic Incentives for Environmental Protection: The Coastal Barrier Resources Act*, 21 Envtl. L. 1015, 1023 (1991).

[4] *See* Wang, *Water and Erosion Damage to Coastal Structures – South Carolina Coast, Hurricane Hugo, 1989*, 58 J. Am. Shore & Beach Preservation Assn. 37 (Oct. 1990) (describing the damage done by Hurricane Hugo); Rogers and Sparks, *Damage to Buildings*, 58 J. Am. Shore & Beach Preservation Assn. 48 (Oct. 1990) (further damage description). *See also* Jones, *supra* note 3, at 1023.

water and disease-carrying microorganisms to enter into the entire community's drinking water.

Projectile damage (damage to second and third tier structures caused by wind and wave-driven debris from structures immediately adjacent to the ocean) creates significant peril and cost to coastal communities.[5] Debris from front row structures, when washed inshore or to near-shore inlets, obstructs rescue equipment, ingress and egress from the threatened community and presents a navigational hazard.

There is a strong correlation between property damage and distance from the beach.[6] Storm damage to the first row of buildings is generally much greater than to the second row. Construction setbacks thus reduce both damage to the first tier of structures and projectile damage to buildings farther inland.[7]

Petitioner's lots are located on the Isle of Palms, which is a coastal barrier island. Coastal barriers are sedimentary landforms, such as islands or sand spits, which shield beaches and wetlands from the direct impact of waves, wind, and storm. Because these landforms are constantly accreting and eroding, they are very fragile and are particularly threatened by development. Erosion is causing most barrier islands to move landward at a rate of one to ten feet per year.[8] Congress has recognized that there is a strong national interest in discouraging development on coastal barrier islands and has

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[5] *See* Wang, *supra* note 4, at 40 for a discussion of the hazards faced on Isle of Palms. *See also* Stauble, Eiser, Birkemeier, Hales & Seabergh, *Erosion Characteristics of Hurricane Hugo on the Beaches of South Carolina*, 58 J. Am. Shore & Beach Preservation Assn. 23 (Oct. 1990).

[6] *See* Wang, *supra* note 4, at 37, 40.

[7] *See* Wang, *supra* note 4, at 46.

[8] National Committee on Property Insurance, *America's Vanishing Coastline* 3 (1988) (hereinafter "National Property Insurance Report").

recently acted to deny federal aid, including protection under the National Flood Insurance Program, to new construction on coastal barriers. *See* 16 U.S.C. § 3501 *et seq.* (Coastal Barrier Resources Act of 1982).[9]

Coastal barrier islands are particularly ill-suited for residential development, given their peculiar vulnerability to storms. The majority of the 13,000 deaths during hurricanes in the United States in this century occurred on barrier islands. In 1900, over 6,000 people died in a single hurricane on one developed island in Texas.[10] Nearly 2,000 people on South Carolina's coastal barrier islands died in a single storm in 1893,[11] when these islands were considerably less developed than they are today.

2. The Federal Coastal Management Program

The Coastal Zone Management Act of 1972 ("CZMA"), 16 U.S.C. § 1451 *et seq.*, is a federal statute designed to provide states with money and incentives to carry out national objectives. It is administered by the National Oceanic and Atmospheric Administration ("NOAA"). State programs (and amendments to such

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[9] Federal subsidies have unwittingly played an important role in fostering unwise development and artificially high property values on the barrier islands. No fewer than eight separate federal programs, ranging from EPA-financed sewage projects to FEMA disaster relief, have contributed. *See* Siffin, *Bureaucracy, Entrepreneurship, and Natural Resources: Witless Policy and the Barrier Islands*, 1 Cato J. 293, 295-303 (1981).

[10] *See* Jones, *supra* note 3, at 1025.

[11] *See Coastal Barrier Resources System: Hearing Before the Subcomm. on Environmental Protection of the Senate Comm. on Environment and Public Works*, 101st Cong., 1st Sess. 55 (1989) (statement of Dr. Robert Sheets, Director, National Hurricane Center, National Weather Service, National Oceanic and Atmospheric Administration).

programs) are submitted to NOAA for its review and approval.

In 1980 amendments to CZMA, Congress made clear that protecting the public from shoreline erosion and coastal hazards should be a primary concern for NOAA and the coastal states. The 1980 amendments direct NOAA to ensure that state coastal programs "provide for . . . [t]he management of coastal development to minimize the loss of life and property caused by improper development in flood-prone, storm surge, geological hazard and erosion-prone areas . . . and by the destruction of natural protective features such as beaches, dunes, wetlands, and barrier islands." 16 U.S.C. § 1452(2)(B). Similarly, the 1980 amendments direct states to enhance their coastal programs by "[p]reventing or significantly reducing threats to life and the destruction of property by eliminating development and redevelopment in high-hazard areas." 16 U.S.C. § 1458(a)(2).[12]

NOAA has directed the states to consider first setbacks or other controls on development to limit the public's exposure to severe storms, erosion, and other coastal hazards. At present, thirteen states and two territories are implementing NOAA- approved beach set-back laws, and most were developed and implemented with federal monies made available through CZMA.[13]

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[12] In discussing the type of state programs Congress intended to encourage, the House report states that an appropriate policy for a barrier island "may be one which requires all development to be a certain distance from the beach in order to allow the island to provide its natural storm protective function." H.R. Rep. No. 1012, 96th Cong., 2nd. Sess. at 43, *reprinted in* 1980 U.S. Code Cong. & Admin. News 4362 at 4391 (1980).

[13] Maine, Delaware, Florida, Rhode Island, Maryland, Alabama, Hawaii, New York, North Carolina, Michigan, New

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3. The South Carolina Coastal Management Program

South Carolina has implemented the goals of the Coastal Zone Management Act by enacting the South Carolina Coastal Zone Management Act of 1977 ("the 1977 Act") and the 1988 Beachfront Management Act. These programs are administered by respondent and have been undertaken with NOAA's financial support and approval.[14]

South Carolina has regulated its "coastal zone" composed of eight coastal counties and designated "critical areas" since 1978. The 1977 Act charged the Council with developing and implementing an erosion control program, including the protection of necessary sand dunes. S.C. Ann. § 48-39-30(B)(4) (Law Co-op. 1987). The Council promulgated implementing regulations for beach erosion control in 1978, having first consulted with outside experts, a technical advisory committee, and citizen working groups as to what shape the program should take. *See Rules and Regulations for Permitting in Critical Areas of the Coastal Zone* i-ii (1986).

The 1978 erosion control program recognized the dangers of building on barrier islands to public safety and to property; its policies contained numerous warnings of the instability of barrier islands in general and inlet areas in particular. Its policies also noted that parts

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Jersey, South Carolina, Pennsylvania, the Northern Marianas Islands, and Puerto Rico. Houlahan, *Comparison of State Construction Setbacks to Manage Development on Coastal Hazard Areas*, 17 Coastal Mgmt. 219, 220 (1989).

[14] South Carolina's coastal management program was approved by NOAA on September 24, 1979. The Beachfront Management Act was approved as an amendment to South Carolina's program in 1989. (Tr. 123).

of some islands, and indeed entire islands, may be unsuitable for development. South Carolina Coastal Council, *State of South Carolina Coastal Management Program and Final Environmental Impact Statement* IV-53 (1979).

Under the 1977 Act, any construction activity in what was designated the "critical area" required a permit from the Council. The 1977 critical area was relatively narrow: the area between the highest uprush of the waves and the landward trough of the primary dune. The Council determined the critical area on a case-by-case basis. *See* Note, *The South Carolina Coastal Zone Management Act of 1977*, 29 S.C. L. Rev. 666, 679-680 (1978). To protect the health of the beach/dune system, the Council prohibited the construction of any habitable structure and limited the use of seawalls, bulkheads and other "hard" structures within the critical area; it also set guidelines for alterations of the beach face such as sandbagging, sand scraping, and renourishment. (Tr. 97.) By any measure, the beach/dune system was under a comprehensive regulatory regime by early 1978.

4. The 1988 Beachfront Management Act

Although erosion control had been a priority since the inception of the South Carolina coastal program, the Council had been unable to prevent effectively the continued loss of shoreline. In October of 1986, three months prior to petitioner's acquisition of his beachfront lots, Senator James M. Waddell, Jr. and the Council appointed a Blue Ribbon Committee on Beachfront Management and charged it with investigating beach erosion and recommending the best means to prevent continued coastal erosion and to preserve important environmental and economic values of South Carolina's coastline. The investigation was careful and detailed.

In March 1987, the Blue Ribbon Committee reported findings of fact and policy recommendations to the Council and to the South Carolina General Assembly. In preparing this report, the Committee "agoniz[ed] over how to balance the interest of the private property owner with that of the public."[15] The report's primary finding was that the South Carolina beach/dune system was in a state of crisis with over 57 miles of beach "critically eroding." Blue Ribbon Report at i. The Committee found that "[t]his erosion is threatening the continued existence of the beach/dune system and thereby threatening life, property, the tourist industry, vital state and local revenue, marine habitat and a national treasure." *Id.* The Committee further found that the "primary causes of this crisis include a persistent rise in sea level, poorly planned development which encroaches upon the beach/dune system and a lack of comprehensive beach management planning." *Id.*[16]

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[15] S.C. Blue Ribbon Comm., *Report of South Carolina Blue Ribbon Committee on Beachfront Management* (hereinafter "Blue Ribbon Report") (1987) (cover letter from Erick B. Ficken, Chairman).

[16] In recommending a new policy of a thirty-year erosion setback to the South Carolina General Assembly, the Committee found that the 1977 Act did "not provide adequate jurisdiction to the South Carolina Coastal Council to enable it to effectively protect the beach/dune system. Consequently, uncontrolled and unwise development sited too close to the beach/dune system has jeopardized the stability of the beach/dune system, accelerated erosion, and endangered adjacent property." Blue Ribbon Report at 1-2.

The Committee further found that "it is in the public and private interest to plan a gradual retreat from the beach/dune system by discouraging new construction in close proximity to the beach/dune system and to encourage those who have erected structures too close to the beach/dune system to retreat from the beach/dune system." *Id.* at 2.

The Committee observed that development led to greater erosion. People purchase new houses on the coast, and then learn that their houses are threatened by erosion. They then seek to preserve their homes at any cost, putting in erosion control devices such as seawalls, bulkheads, or rip-rap. As the Committee stated:

> "most erosion control devices result in increased erosion, a drastic lowering of the beach profile (thereby reducing the beach/dune system's tourist and recreational value) and a decrease in the ability of the beach/dune system to protect upland property from storms and high tides. The result of attempting to protect upland property utilizing hard erosion control structures is that dry sand beaches are rapidly disappearing thereby placing many millions of tourist dollars in jeopardy." [Blue Ribbon Report at ii.]

Erosion control structures require making a choice between protecting buildings or protecting the beach, which is usually the most important economic asset of the community. National Property Insurance Report at 1. While beach armoring may protect certain structures, it can be so destructive to the actual beach that both Maine and North Carolina have barred construction of any new erosion control structures. *Id.* at 7. Studies conducted in the Florida Panhandle before and after Hurricane Eloise struck showed that seawalls nearly doubled erosion rates for the areas just beyond their ends. *Id.*

In June 1988, the South Carolina Beachfront Management Act was adopted by the South Carolina General Assembly. The 1988 Act did not change the uses permitted within the designated critical areas. Rather, it enlarged the designated critical areas to encompass the area from the mean high watermark to a setback line which is determined by calculating a distance landward from the crest of an ideal oceanfront sand dune which is forty times the annual erosion rate. S.C. Code Ann.

§ 48-39-280 (Law. Co-op. Supp. 1990). This change has generally moved the critical area landward.

The 1988 Act recognizes the highly volatile nature of unstabilized inlets by setting the baseline at the most landward point of erosion at any time during the past forty years.[17] The setback and baselines must be revisited by the Council not less than every eight years and not more than every ten years. S.C. Code Ann. § 48-39-280(C) (Law. Co-op. Supp. 1990). The 1988 Act provides an appeal process for any landowner who feels that the setback line, erosion rate or baseline were set in error. S.C. Code Ann. § 48-39-280(E) (Law. Co-op. Supp. 1990). Petitioner has not challenged the accuracy of the setback line or baseline affecting his lots.[18]

The 1988 Act prohibits new erosion control devices except to protect existing public highways. S.C. Code Ann. § 48-39-290(B)(2)(a) (Law. Co-op. Supp. 1990). Under some circumstances, habitable structures can be constructed within the setback zone but not within 20 feet of the baseline within the no-construction zone. S.C. Code

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[17] In unstabilized inlet areas, such as the one on which petitioner's lots are located, sand movements are dynamic, complex and unpredictable. Tidal flushing through the inlet combines with littoral drift to interrupt the normal flow of sand, creating migrating sand shoals and sand bars. The movement of these sand formations can cause the inlet to migrate, close down suddenly, or expand. Shoals can migrate in the general down-drift direction; these shoals then attach themselves to the downdrift island. During that process, however, severe erosion may take place both ahead of and behind the shoal, creating additional risk from storm surge and erosion. (Tr. 65-66.)

[18] In fact, the consulting firm for the Council which prepared the setback lines was the same consulting firm which prepared the analysis for the Wild Dunes development in which petitioner was a principal. (Tr. 62-63, 90-94.)

Ann. § 48-39-280(B) (Law. Co-op. Supp. 1990). There are restrictions on rebuilding structures damaged by storm or erosion and in some cases habitable structures that are damaged beyond repair cannot be replaced. *Id.*

In 1990, the Beachfront Management Act was amended to allow the Council to issue special use permits to build habitable structures under special circumstances seaward of the baseline. S.C. Code Ann. § 48-39-290 (Law. Co-op. Supp. 1990). Petitioner could apply for such a permit but has not done so.

5. Petitioner and His Property

Petitioner moved to the Isle of Palms in 1978. (Tr. 24, 123.) He was a contractor for a condominium development known as "Wild Dunes". He became a partner in the development and was involved in planning and sales before selling his share of the company. (Tr. 23-24.) With the proceeds of that sale, he purchased two ocean front lots, lots 22 and 24, along Beachwood East Drive on December 3, 1986. (Tr. 23-24.) These lots are the subject of this action.

Petitioner's lots are located in what was designated a "critical area" under the 1977 Act and what is now designated an "unstabilized inlet zone" under the 1988 Act. (Tr. 13). Since 1949, the time from which aerial photographs are available, the shoreline near the lots has behaved with the instability expected in inlet areas. (Tr. 65-66.) In that year, the shoreline was entirely landward of these lots. (Tr. 78.) By 1953, the shoreline had migrated 200 feet seaward, and there was little change through 1957. By 1963, however, the shoreline had eroded to about the center of the street behind petitioner's lots and the lots were underwater at all stages of the tide. (Tr. 82.) By 1968, the shore had eroded a further 100-105 feet. (Tr. 79.) In 1973, a tidal pond covered a significant portion of the lots. (Tr. 82.) Since 1949, the active beach or surf zone has occupied petitioner's property about 50 percent of the time. (Tr. 84.)

From 1973 to the present, the shore line in the immediate vicinity of petitioner's lots has generally been accreting, but it has also been subject to episodic events of severe erosion. (Tr. 13, 20-21.) Between 1982 and 1983, when petitioner was involved in the development of a condominium project near his present lots, the Isle of Palms issued 12 emergency orders for sandbagging to protect property 2,200 feet from petitioner's lots. (Tr. 99.) The Council also issued permits for two revetments – sloping erosion control structures – to protect condominium developments near petitioner's property and one revetment extends to one of his lots. (Tr. 101.) The revetments, one 850 feet and the other 1,300 feet long, were among the longest the Council has ever permitted. (Tr. 101.) To issue the permits, the Council had to find that habitable structures were in imminent danger of collapse. (Tr. 104.) Mariner's Walk, one of the condominium developments behind the revetments, was again threatened in 1987, requiring a beach renourishment project. (Tr. 65.)

Petitioner has not sought a permit which would allow him to build on his remaining two lots. (Tr. 40.) Rather, he seeks to be compensated for the profit he thinks he should have made. Having developed neighboring property in what he knew to be designated a critical area under the more accommodating 1977 regulations, petitioner now asks the state to indemnify him against the informed risk which he took when he purchased his lots.

SUMMARY OF ARGUMENT

Government has a well established right to prevent the use of property if such use is injurious to public health, safety or the environment. The instances where the exercise of such power has been found to require compensation to a property owner have been relatively few and have required more than a showing that the regulation in question has substantially diminished the value of such property. The Court has recognized that all property is held subject to an "implied obligation that the owner's use of it shall not be injurious to the community" and that the state's enforcement of this obligation requires no compensation to the property's owner. *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 491-92 (1987), *quoting Mugler v. Kansas*, 123 U.S. 623, 665 (1887). While this principle may have historical roots in common with the law of nuisance, its application is not limited by tort law doctrines.

The Court should not attempt to articulate a set formula for determining when government regulation constitutes a taking for which compensation is constitutionally required. The question of what justness and fairness require is best approached through an ad hoc factual inquiry which examines the character of government action as well as its economic impact.

The Court's decisions rejecting challenges under the Just Compensation Clause to zoning ordinances and other exercise of the policy power have consistently recognized the need for deference to legislative judgment. *See, e.g., Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388-89 (1926). What dangers to the public health, safety or the environment exist, what measures are necessary to protect the public, what impact such measures have on various classes of persons and property, and what alternative remedies might have been adopted are complex questions of policy and fact which the Constitution grants the legislative branch the power to determine.

The Beachfront Management Act was enacted by the South Carolina legislature in response to serious threats to public health, safety and the environment. It establishes construction setbacks to protect lives, property, public facilities and the beach/dune system itself from coastal hazards, storm surge and erosion. It represents the legislature's well informed judgment that the land use restrictions it contains are necessary to protect the public from these threats.

Much of the confusion in the lower courts' discussion of whether the South Carolina Beachfront Management Act has effected a taking of petitioner's property appears to stem from his profession that he was not challenging the Act's constitutionality. Yet, by asserting a constitutional right to compensation where none existed statutorily, the complaint could only be construed as challenging the constitutionality of the Act as applied to his property.

By conceding the Act's validity on its face, petitioner admitted the legislative's findings concerning the serious harms of coastal erosion, and that the Act's land use restrictions were as a general matter, reasonably necessary to prevent them. To show that the Act was unconstitutional as applied to him, petitioner needed to show, in addition to substantially diminished value, that application of the restrictions to his specific lots was not reasonably related to prevention of the identified harms. He failed to meet this burden.

Once it is acknowledged that mere diminution in value is not sufficient to establish a taking, petitioner's claim must be rejected and the decision below affirmed. Affirming the decision below would not foreclose the petitioner from seeking a building permit from the South Carolina Coastal Council under the 1990 amendments to the Act. The Court should not consider the application of these amendments to petitioner's property until the Council and the South Carolina courts have first addressed the question.

ARGUMENT

I. THE PURPOSE AND CHARACTER OF GOVERNMENT ACTION DETERMINES WHEN COMPENSATION FOR A SUBSTANTIAL DIMINUTION IN VALUE IS CONSTITUTIONALLY REQUIRED

By urging economic impact as the sole criterion for determining when government is constitutionally required to pay compensation to a property owner adversely affected by it actions, petitioner invites the Court to overturn more than a century's worth of precedent. The Court's decisions "uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking.'" *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 131 (1978). Government has a long established right to prevent uses of property that cause harm to the "public health, safety, morals, or general welfare"[19] and rarely has such regulation been found to require compensation to be paid to the property owner.

The Court has properly recognized the intensely factual nature of the analysis required by the Fifth Amendment's Just Compensation Clause and therefore has repeatedly refused to adopt a set formula for its application. *See Keystone*, 480 U.S. at 495; *Penn Central*, 438 U.S. at 124; *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962). Instead, it has articulated a multiplicity of factors which include, in addition to economic impact on the property owner, the character of government action.[20] It is misleading to term this collection of factors "a test." The application of these standards has been truly ad hoc, conducted with respect to specific property, with no

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[19] *Penn Central*, 438 U.S. at 125; *see Mugler*, 123 U.S. at 661.

[20] In *Penn Central*, interference with "investment-backed expectations" was introduced to the takings discourse as a means of evaluating economic impact on the property owner, not as a separate prong to a test. *See* 438 U.S. at 124-25.

single factor or combination of factors outcome determinative.[21]

Diminution in the value of property is a necessary element in any taking claim, but alone has never been a sufficient condition. There have been cases where the taking has been very substantial or even total yet the Court has concluded that compensation is not constitutionally required.[22]

As the Solicitor General has ably demonstrated, there exists a wide variety of governmental activities "that may result in substantial diminution of property values, and yet not require payment of compensation as a condition to its lawful exercise." Brief for the United States at 12. The government may seize and destroy food, drugs,

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[21] In addition to economic impact, investment-backed expectations, and the character of government action, the Court's decisions have identified other factors to be considered, including whether there has been a "permanent physical occupation" (*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982)), whether the restriction on its use results in "average reciprocity of advantage" (*Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922)), whether "public use" is being made of private property (*United States v. Dickinson*, 331 U.S. 745, 748 (1947)), and whether the property is burdened "disproportionately" (*PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 n.7 (1980)). Clearly there is an overlap among the various factors, and none of them can be measured precisely. Such concepts (which have been characterized as "instrumentally and even logically vulnerable") do not represent a true test but simply are a means of explaining the Court's "situated judgment." *See* Michelman, *Takings, 1987*, 88 Columbia L. Rev. 1600, 1628-29 (1988).

[22] *See, e.g, United States v. Caltex, Inc.*, 344 U.S. 149 (1952) (total destruction of oil refinery); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (75% diminution in value caused by zoning law); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (87.5% diminution in value).

pesticides and other goods without any payment of compensation under many different statutes.[23] During wartime, the government may, without paying compensation, destroy property to prevent it from falling into enemy hands.[24] Similarly, it may be lawful to manufacture and sell a drug one day and a felony to do so the next.[25] When this occurs, existing inventory becomes valueless but no right to compensation arises.

As the Solicitor General has also shown, there are many examples of government actions affecting real property which result in substantially diminished value without any compensation being required or paid. Brief for the United States at 13-14. Examples include condemnation of unsafe structures, building code requirements and restrictions prohibiting construction on steep slopes. Government has long had the right to tear down a building to create a fire break without compensation to the owner.[26] Similarly, damage to property resulting from efforts to control a riot is not compensable.[27] "[T]he Court has repeatedly upheld regulations that destroy or adversely affect real property interests." *Keystone*, 480 U.S. at 489 n.18 (citations omitted).

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[23] *See, e.g.*, Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 408-09; Federal Meat Inspection Act, 21 U.S.C. §§ 101-05; Toxic Substances Control Act, 15 U.S.C. § 2616; Anti-Monopoly Acts, 15 U.S.C. §§ 6, 11; Falsely Stamped Gold and Silver Act, 15 U.S.C. § 292.

[24] *United States v. Caltex, Inc.*, 344 U.S. at 155.

[25] *See, e.g, Touby v. United States*, ___ U.S. ___, 11 S.Ct. 1752 (1991).

[26] *See Bowditch v. Boston*, 101 U.S. 16, 18-19 (Pa. 1879); *Respublica v. Sparhawk*, 1 U.S. (1 Dall.) 357, 362 (1788).

[27] *See National Board of Y.M.C.A. v. United States*, 395 U.S. 85 (1969).

Although every generalization in the area of takings law is riddled with exceptions, the Court's decisions have, if anything, focussed more on the character of the governmental action than on economic impact. "Many cases before and since *Pennsylvania Coal* have recognized that *the nature of the State's action is critical in takings analysis.*" *Keystone*, 480 U.S. at 488 (emphasis supplied). Indeed, there have been cases where the character of the government's action alone appears to have been the sole ground for rejecting a Fifth Amendment claim to compensation.[28]

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[28] Conversely, the character of government action has been an extremely important factor in the cases where the Court has found compensation to be constitutionally required. "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government." *Penn Central*, 438 U.S. at 124. Each of the recent land use cases where the Court has found a taking has involved a physically invasive action which deprived the owner of the property's exclusive use. *See Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

In fact, until *Pennsylvania Coal*, it seemed "settled that, to entitle the owner to protection under this clause the property must be actually taken in the physical sense of the word." T. Sedgwick, *A Treatise on the Rules Which Govern the Interpretation and Construction of Statutory and Constitutional Law*, 519-20 (1857). This view is apparent in the language of Madison's first draft of the Just Compensation Clause, which read: "[n]o person shall be . . . obligated to relinquish his property, where it be necessary for public use, without a just compensation." *See* Speech Proposing the Bill of Rights (June 8, 1789), *in* 12 James Madison, *The Papers of James Madison* 197, 201 (R. Rutland ed. 1977), *cited in* Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694, 711 n.95 (1985). The accounts of congressional debates shed no light on why the language was changed.

Some but not all of these cases have involved nuisance abatement or prevention of uses which the Court has termed "noxious."[29] Yet many of the statutes or ordinances at issue have involved no "blameworthiness, . . . moral wrongdoing or conscious act of dangerous risk taking." *Penn Central*, 438 U.S. at 134 n. 30.[30] Many, particularly in the area of land use regulation, have simply sought to prevent "a right thing in the wrong place – such as a pig in a parlor." *Euclid v. Ambler Realty Co.*, 272 U.S. at 388.[31] "These cases are better understood as resting not on any supposed 'noxious' quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy . . . expected to produce a widespread public benefit and applicable to all similarly situated property." *Penn Central*, 438 U.S. at 134 n.30.[32] The ultimate question is one of "fairness and justice" in the distribution of public burdens. *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

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[29] *See, e.g, Reinman v. Little Rock*, 237 U.S. 171, 176 (1915); *California Reduction Co. v. Sanitary Reduction Works of San Francisco*, 199 U.S. 306, 323 (1905); *Mugler*, 123 U.S. at 670.

[30] *See, e.g., Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (brickyard); *Miller v. Schoene*, 276 U.S. 272 (1928) (cedar trees); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (gravel and sand mine).

[31] *See Gorieb v. Fox*, 274 U.S. 603 (1927) (upholding ordinance establishing a setback line); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (upholding ordinance forbidding adult theaters within 500 feet of residential area); *Laurel Hill Cemetery v. San Francisco*, 216 U.S. 358 (1910) (ordinance forbidding cemeteries within city limits).

[32] We agree with the Solicitor General that it would be "strange to characterize the building of a single-family residence as a 'nuisance'." Brief for the United States at 23. This argument illustrates what is wrong with relying too heavily on the "nuisance" analogy in determining what constitutes a taking. What the history of the Beachfront Management Act shows

(Continued on following page)

Labeling a use "noxious" is often simply the statement of a conclusion and not an explanation of how it was reached.[33] To a beer drinker, the operation of a brewery (*Mugler*) is not a noxious use of property. Presumably not all members of the community agree that showing adult movies is "noxious;" yet the Court has upheld a zoning ban of adult theaters notwithstanding its substantial economic impact on the owners of existing theaters. *Renton v. Playtime Theatres*, 475 U.S. 41 (1986). Trading in legally acquired animal pelts or feathers, although formerly permissible commercial behavior, can be prohibited without compensation. *Andrus v. Allard*, 444 U.S. 51, 64 (1979); *see Defenders of Wildlife v. Endangered Species Scientific Authority*, 659 F.2d 168 (D.C. Cir.), *cert. denied*, 454 U.S. 963 (1981).

The economic impact on the homeowner is the same whether his house is destroyed to prevent a fire's spread

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is that construction of a house on the beach or dune would place another pig in the parlor.

The fact that the legislature has decided not to require the immediate destruction of a house on an adjacent lot simply reflects its judgment that such action would go too far in upsetting reasonable investment-backed expectations. Instead, the legislature has chosen a policy of gradual retreat from the shore which permits existing structures to stand for the remainder of their economic life but not to be rebuilt. The distinction which the legislature has drawn in order to balance private property rights with the public interest is consistent with the axiom that ameliorative action can proceed one step at a time, and should not be second-guessed by the Court. *See New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

[33] *See* Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 49-50 (1964); Plater, *The Takings Issue in a Natural Setting: Floodlines and the Police Power*, 52 Tex. L Rev. 201, 237 n.119 (1974).

or to permit the widening of a street. Likewise, the property owner's loss from damage incidental to suppression of a riot may be greater than if the government had temporarily occupied his property for military purposes.[34] In each case, it is the purpose and character of the state's action which distinguishes the compensable from the non-compensable event.

II. DEFERENCE TO LEGISLATIVE JUDGMENT IS REQUIRED IN A TAKINGS ANALYSIS

Where the Court has held that a lawful exercise of the police power requires no compensation to an affected property owner, the Court has explicitly or implicitly deferred to the legislature (be it federal or state) on the question of what constitutes the public health, safety, morals or welfare and as to what restrictions are necessary for its protection.

The Court has often recognized the complexity of such questions. *See, e.g., Gorieb v. Fox*, 274 U.S. at 608. Thus, in the case of regulatory legislation, "the existence of facts supporting the legislative judgment is to be presumed." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938). For more than fifty years, legislative exercise of the police power has been upheld where it is not arbitrary or capricious and the measure chosen is reasonably necessary for the accomplishment of a legitimate government purpose. *Pacific States Co. v. White*, 296 U.S. 176, 182 (1935).

This principle is now black letter law. In review of a state's exercise of its police power, the Court has examined only whether the state "could rationally have decided" that the measure adopted might achieve the state's objective. *Minnesota v. Cloverleaf Creamery Co.*, 449

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[34] *Compare National Board of Y.M.C.A. v. United States*, 395 U.S. 85 (1969), *with United States v. General Motors*, 323 U.S. 373, 378 (1945).

U.S. 456, 466 (1981). The Court has recognized that it does "not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare." *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952). Yet in most of these garden-variety police power cases, the statute in question had an adverse economic impact on the party challenging it, and sometimes a quite substantial one.[35]

Invocation of the "takings" clause should not cause the Court to jettison the deference inherent in the *Carolene Products* standard. The Court's seminal takings decision recognized that "courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives." *Mugler*, 123 U.S. at 662. Almost any aggrieved property owner claiming a denial of due process or equal protection can recast his challenge to regulatory action as a "taking."[36] In rejecting a takings challenge to statutory provisions which had been previously upheld as a legitimate exercise of the police power under a due process analysis, the Court stated:

> Although [the prior decisions] were due process cases, it would be surprising indeed to discover that in both cases Congress unconstitutionally had taken the assets of the employers there involved. [*Connolly v. Pension Benefit Guaranty Corporation*, 475 U.S. 211, 223 (1986).]

Nollan v. California Coastal Commission, 483 U.S. 825 (1987), did not repudiate the principle of deference. In

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[35] *See, e.g., Williamson v. Lee Optical*, 348 U.S. 483 (1955) (opticians barred from fitting eyeglasses or grinding lenses without prescription); *United States v. Carolene Products Co.*, 304 U.S. 144 (1938) (ban of milk with vegetable fat added); *Powell v. Pennsylvania*, 127 U.S. 678 (1888) (ban on manufacture or sale of oleomargarine).

[36] *See* Michelman, *Takings, 1987*, 88 Columbia L. Rev. at 1613.

reviewing earlier decisions holding that a use restriction must substantially advance a legitimate state interest to pass muster under the Just Compensation Clause, the Court recognized that "a broad range of government purposes and regulations satisfies these requirements." *Id.* at 834-35. It found that the condition which the Commission had attached to the Nollans' building permit amounted to the "appropriation of a public easement" and was not "reasonably related to" the burdens which the new house would create under "even the most untailored standard." 483 U.S. at 834, 838.

Nollan suggests that a somewhat stricter scrutiny of means and ends is required where the character and purpose of government action is such (e.g., a physical occupation) that the state's claim to be acting under the police power is suspect. It would be strange to view a construction setback requirement in that way. Such requirements have been recognized as permissible since *Gorieb v. Fox*. Unlike the easement required in *Nollan*, the Beachfront Management Act's use restrictions are not physically invasive and do not interfere in any way with petitioner's right to the exclusive use and enjoyment of his property.

The Court's decisions upholding the validity of zoning ordinances have consistently recognized the need for deference to the legislature's judgment. In the first takings challenge of a zoning ordinance to reach the Court, it stated:

> The inclusion of a reasonable margin to insure effective enforcement, will not put upon a law, otherwise valid, the stamp of invalidity. Such laws may also find their justification in the fact that, in some fields, the bad fades into the good by such insensible degrees that the two are not capable of being readily distinguished and separated in term of legislation. In the light of these considerations, we are not prepared to say that the end in view was not sufficient to justify the general rule of the ordinance, although some

> industries of an innocent character might fall within the proscribed class. [*Euclid v. Ambler Realty Co.*, 272 U.S. at 388-89.]

Thus, the Court has indulged a "presumption of constitutionality" when land use restrictions are challenged on takings ground, just as it has done when regulation is challenged on the basis of the due process and equal protection clauses. *See Goldblatt v. Hempstead*, 369 U.S. at 594.

III. THE BEACHFRONT MANAGEMENT ACT REPRESENTS THE WELL-INFORMED JUDGMENT OF THE SOUTH CAROLINA LEGISLATURE CONCERNING MEASURES NECESSARY TO PROTECT PUBLIC HEALTH, SAFETY AND THE ENVIRONMENT

The Beachfront Management Act represents the South Carolina legislature's well informed judgment that the measures it contains are necessary to protect against serious threats to public health, safety and the environment. The history of South Carolina's coastal management program demonstrates that the construction setbacks which it establishes are necessary to protect lives, property, public facilities and the beach/dune system itself from coastal hazards, storm surge and erosion. The legislature's findings are not contested and alone are a sufficient basis to uphold the Act's constitutionality.

The South Carolina legislature has properly concluded that coastal erosion presents an immediate threat to lives, property, the ecosystem and South Carolina's tourist economy.[37] It has also accurately found that development exacerbates erosion by destroying the natural dunes and disrupting the beaches' pattern of accreting and shifting sand.[38] These conclusions are supported by

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[37] See discussion at 2-5, 9, *supra*.

[38] See discussion at 2-3, 10, *supra*.

the report of a fact-finding committee, by federally funded studies, by the findings and legislature history of three federal statutes, and by a broad body of scientific and technical literature.

South Carolina's Beachfront Management Act is a carefully crafted response to the problem of coastal erosion, enacted after less restrictive measures proved ineffective. Its policy of a gradual retreat from the shore represents a rational balancing of private property rights and the public interest. The legislature has accurately recognized that there is no engineering solution to erosion on a coast-wide basis. Studies have repeatedly concluded that beach armoring solutions, such as seawalls, cause increased erosion to other parts of the coast and do not provide effective protection against storm surge.[39] Experience on the Isle of Palms confirms this. Neither this evidence nor the legislature's findings have been contested by petitioner.

The Court has long recognized that "state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare." *Day-Brite*, 342 U.S. at 423. Clearly construction setbacks are rationally related to the objectives of preserving the coast and preventing harms to the public arising from coastal erosion.

IV. PETITIONER HAS FAILED TO CHALLENGE WHETHER APPLICATION OF THE BEACHFRONT MANAGEMENT ACT TO HIS PROPERTY IS REASONABLY RELATED TO THE ACT'S OBJECTIVES

The decision below has properly deferred to the South Carolina legislature's judgment that "there is an evil at hand for correction" and that the Beachfront Management Act is "a rational way to correct it." *Williamson v.*

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[39] See discussion at 10-12, *supra*.

Lee Optical of Oklahoma, Inc., 348 U.S. at 484. The stricter scrutiny which the Solicitor General is urging here would undermine the principle, recognized in the Court's takings jurisprudence from *Mugler* to *Keystone*, that "debatable questions as to reasonableness are not for the courts but for the legislature." *Goldblatt v. Hempstead*, 369 U.S. at 595 (citations omitted).

Notwithstanding professions to the contrary, petitioner's action is a challenge to the constitutionality of the Act as applied to his property. The Act (prior to the 1990 amendments) contained no provisions for paying compensation to any affected property owner. By asserting a constitutional right to compensation where none existed statutorily, the complaint could only be so construed.

Both because the petitioner was the plaintiff in the proceedings below and because the Beachfront Management Act is entitled to the "presumption of constitutionality," he had the burden of proof on reasonableness. *Goldblatt v. Hempstead*, 369 at 595-96; *see Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529 (1959). Yet petitioner has failed to challenge the Act in any way, save that it has an adverse economic impact on him.[40]

The Solicitor General is misguided in his suggestion that "a more searching inquiry was required at the threshold to determine which of the purposes of the Act were actually implicated in application of the building restrictions to petitioner's lots." Brief for the United States at 20. Each of the Act's stated purposes describes a

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[40] Petitioner's property has not been "singled out" to bear the burden of South Carolina's attempt to remedy the problem of coastal erosion. The Act's restrictions apply to all property within the critical zone. *See Nollan*, 483 U.S. at 835 n.4. Although the Act does not require the destruction of existing structures, reconstruction or alterations to existing structures seaward of the setback line are subject to the same prohibitions and limitations as new construction. *See* S.C. Code Ann. § 48-39-290(A)-(B) (Law. Co-op. Supp. 1990).

benefit to the public which will flow to the public from prevention of the harm of coastal erosion, but in each case the *harm* to be prevented is the *same*.

Petitioner has not questioned the existence of the harms at which the Act is aimed, nor that establishing a setback line is related to those harms' prevention. Although the Act provides for the use of a different baseline when it can be demonstrated that "the shoreline is unlikely to return to its former position" (S.C. Code Ann. § 48-39-280(E) (Law. Co-op. Supp. 1990)), petitioner has not challenged where the baseline was set. He has not attempted to show that development of his land will not contribute to coastal erosion nor that the state had any less burdensome or less restrictive alternative means to accomplish the legislative purpose whose lawfulness he concedes.[41]

In taking the lower courts to task for failing to discuss the relationship of the statutory requirements to public health and safety measures, the extent to which the Act's purposes were furthered by its application to petitioner's lots, or the "degree, likelihood, or proximity of the identifiable harms to which the Act is addressed,"[42] the Solicitor General is urging the Court to reverse the traditional presumption of constitutionality and shift the plaintiff's burden to the state *even on questions petitioner did not raise*. There is a wealth of

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[41] Ordinarily one would expect questions such as less restrictive alternatives to be raised at a hearing on a permit application. Since petitioner has never sought a building permit or challenged administratively the setting of the baseline, there is an issue as to whether any justiciable controversy concerning such questions exists. *See Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 190-91 (1985).

[42] Brief for the United States at 22-23.

information in the record below or subject to judicial notice showing that the coastal zone management program adopted by South Carolina is the only feasible means of protecting the public from very serious harms attendant upon unwise development of coastal property. However, it is not the function of the courts to raise such questions sua sponte or to sift and weigh such evidence de novo. *See Flast v. Cohen*, 392 U.S. 83, 94-95 (1968).

V. BECAUSE PETITIONER HAS IGNORED HIS BURDEN OF PROOF, THE DECISION BELOW MUST BE AFFIRMED

To show that the Act was unconstitutional as applied to his land after conceding its facial validity, petitioner had to show that application of the restrictions to his land was not reasonably related to the prevention of coastal erosion as well as that he had suffered economic loss. Because petitioner made no attempt to meet this burden, the decision below should be affirmed. Any other conclusion would deny the state the "reasonable margin to insure effective enforcement"[43] of its police power objectives to which it has long been held entitled.

On the other hand, affirming the decision below will not foreclose petitioner from seeking a building permit from the South Carolina Coastal Council under the 1990 amendments to the Act. If denied, judicial review of the Council's decision would be available under the standard stated in those amendments. In such proceedings, the statute now places the burden on the state to show that restrictions placed on the aggrieved landowner's property are not an unreasonable exercise of the police power. S.C. Code Ann. § 48-39-290(D) (Law. Co-op. Supp. 1990). If the landowner prevails, the courts must either direct

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[43] *Euclid*, 272 U.S. at 388-89.

that the necessary permits be issued or that reasonable compensation be paid. *Id.* The Court should not consider the application of the new standard to petitioner's property until the South Carolina courts have first addressed it. *See Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 501 (1941).

Respectfully submitted,

LAWRENCE N. MINCH
LILLICK & CHARLES
Two Embarcadero Center
San Francisco, CA 94111
(415) 984-8200

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No. 91-453

In The

Supreme Court of the United States

October Term, 1991

DAVID H. LUCAS,

Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

Brief of the States of Florida, Alabama, Connecticut, Delaware, Georgia, Hawaii, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New Hampshire, New York, North Carolina, Oregon, Pennsylvania, Rhode Island and the Rhode Island Coastal Resources Commission, Utah, Vermont, Virginia, Wisconsin, Texas, and the Territory of Guam and Commonwealth of Puerto Rico as Amici Curiae in Support of Respondent

---

ROBERT A. BUTTERWORTH
Attorney General of Florida
LOUIS F. HUBENER
Counsel of Record
Assistant Attorney General
DEPARTMENT OF LEGAL AFFAIRS
The Capitol — Suite 1502
Tallahassee, FL 32399-1050
(904) 488-9935
Attorneys for Amicus Curiae
State of Florida

(Other counsel listed on inside front cover)

BEST AVAILABLE COPY

James H. Evans
Attorney General
State of Alabama

Richard Blumenthal
Attorney General
State of Connecticut

Charles M. Oberly III
Attorney General
State of Delaware

Michael J. Bowers
Attorney General
State of Georgia

Elizabeth Barrett-Anderson
Attorney General
Territory of Guam

Warren Price
Attorney General
State of Hawaii

Bonnie J. Campbell
Attorney General
State of Iowa

Michael E. Carpenter
Attorney General
State of Maine

J. Joseph Curran, Jr.
Attorney General
State of Maryland

Scott Harshbarger
Attorney General
State of Massachusetts

Frank J. Kelley
Attorney General
State of Michigan

Hubert H. Humphrey III
Attorney General
State of Minnesota

Frankie Sue Del Papa
Attorney General
State of Nevada

Robert J. Del Tufo
Attorney General
State of New Jersey

John P. Arnold
Attorney General
State of New Hampshire

Tom Udall
Attorney General
State of New Mexico

Robert Abrams
Attorney General
State of New York

Jerry Boone
Solicitor General
State of New York

Lacy H. Thornberg
Attorney General
State of North Carolina

Charles S. Crookham
Attorney General
State of Oregon

Ernest D. Preate, Jr.
Attorney General
Commonwealth of Pennsylvania

Jorges Perez-Diaz
Attorney General
Commonwealth of Puerto Rico

James E. O'Neil
Attorney General
State of Rhode Island

Brian A. Goldman
Legal Counsel
Rhode Island Coastal
Resources Commission

Paul Van Dam
Attorney General
State of Utah

Jeffrey L. Amestoy
Attorney General
State of Vermont

James E. Doyle
Attorney General
State of Wisconsin

Dan Morales
Attorney General
State of Texas

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INTEREST OF AMICI

Amici respectfully submit this brief in support of the respondent pursuant to Rule 37, Rules of the Supreme Court of the United States.

The states that have joined as amici in this case, together with their many political subdivisions, exercise a broad range of regulatory powers within their respective jurisdictions. They are charged with the difficult and delicate responsibility of balancing demands for development against public health and safety concerns. This appeal raises, for the first time in the course of this suit, the question of whether petitioner's land, located in a hazardous area, is suited for development and what dangers would attend that development. Although the property in question here is beachfront land and thus of particular interest to the coastal states, all states that attempt to regulate or restrain development of land exposed to the hazards and ravages of nature must be concerned with the outcome.

Since the passage of the Federal Coastal Zone Management Act in 1972 that required the states to better control coastal development, every coastal state has enacted laws to protect its coastline.[1] Countless jurisdictions have

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1 The Coastal Zone Management Act, 16 U.S.C. §§ 1451-1464, administered by NOAA, directs that states minimize loss of life and property caused by improper development in flood-prone, storm surge and erosion-prone areas and by destruction of beaches, dunes and barrier islands. *See* 16 U.S.C. §§ 1452(2)(B), 1456(b)(2). The 1990 amendments direct that state programs prevent or significantly reduce threats to life and property by eliminating development and redevelopment in high-hazard areas. *See* 16 U.S.C. § 1458(a)(2)(1990).

The following 24 states have enacted laws for protection of coastal areas: Alabama, Coastal Area Management Act, Ala. Code §§ 9-7-10 to 9-7-20 (1987); Alaska, Coastal Management Program Law, Alaska Stat. §§ 46.40.010 to 46.40.210 (1987); California Coastal Act, Ca. Pub. Res. Code §§ 30000-30900 (West 1986); McAteer-Petris Act, Ca. Govt. Code

§ 66600 *et seq.* (West 1991); Connecticut, Inland Wetlands and Watercourses Act, Conn. Gen. Stat. §§ 22a-36 to 22a-45 (1985), Coastal Management Act, Conn. Gen. Stat. §§ 22a-90 to 22a-113 (1985), Tidal Wetlands Act, Conn. Gen. Stat. §§ 22a-28 to 22a-35 (1985); Delaware Beach Preservation Act, 7 Del. Code Ch. 68, Coastal Zone Act, 7 Del. Code Ch. 70 (1990), Wetlands Act, 7 Del. Code Ch. 66 (1983); Florida, Beach and Shore Preservation Act, Fla. Stat. §§ 161.011-161.58 (1988), Coastal Management Act, Fla. Stat. §§ 380.19-380.27 (1978), Wetlands Protection Act, Fla. Stat. §§ 403.901-403.938 (1990); Georgia, Coastal Marshlands Protection Act of 1970, Ga. Code Ann. §§ 12-5-280 to 12-5-292 (1982 & Supp. 1987), Shore Assistance Act of 1979, Ga. Code Ann. §§ 12-5-230 to 12-5-246 (1982 & Supp. 1987); Hawaii, Coastal Zone Management Law, Haw. Rev. Stat. §§ 205A-1 to 205A-49 (1988 & Supp. 1990); Louisiana, State and Local Coastal Resources Management Act of 1978, La. Rev. Stat. Ann. §§ 49:213.1-49:214.41 (Supp. 1990); Maine, Natural Resources Protection Act, Me. Rev. Stat. Ann. tit. 38, §§ 480A-490 (1990), Shoreland Protection Act, Me. Rev. Stat. Ann. tit. 38, §§ 435-447 (1964 & Supp. 1987); Maryland, Wetlands Law, Md. Nat. Res. Code Ann. §§ 9-101 to 9.603 (1990 & 1991 Supp.), Beach Erosion Control and Replenishment Act, Md. Nat. Res. Code Ann. §§ 8-1101 to 8-1105.1 (1990 and 1991 Supp.); Massachusetts, Wetlands Protection Laws, Mass. Gen. L. ch. 130, § 105, ch. 131 §§ 40-42 (1979 & Supp. 1987); Michigan, Shorelands Protection and Management Act of 1970, Mich. Comp. Laws Ann. §§ 281.631-281-644 (1979), Goemare-Anderson Wetland Protection Act, Mich. Comp. Laws Ann. §§ 81-701-281.722 (Supp. 1987); Mississippi, Coastal Wetlands Protection Law, Miss. Code Ann. §§ 49-27-1 to 49-27-69 (1990); New Hampshire, Wetlands Act, N.H. Rev. Stat. Ann. §§ 483-A:1 to 483-A:8 (1983 & Supp. 1986); New Jersey, Coastal Area Facility Review Act, N.J. Stat. Ann. §§ 13:19-1 to 13:19-23 (West 1979 & Supp. 1987), Wetlands Act of 1970, N.J. Stat. Ann. §§ 13:9A-1 to 13:9A-10 (West 1979 & Supp. 1987); New York, Waterfront Revitalization and Coastal Resources Act, Exec. Law Art. 42 (McKinney 1984); Freshwater Wetlands Act, N.Y. Envtl. Conserv. Laws §§ 24-0101 to 24-1305 (McKinney 1984 & Supp. 1988), Tidal Wetlands Act, N.Y. Envtl. Conserv. Law §§ 25-0101 to 25-0601 (McKinney 1984), Coastal Erosion Law, N.Y. Envtl. Conserv. Law §§ 34-0101 to 34-0113 (McKinney 1984); North Carolina, Coastal Area Management Act of 1974, N.C. Gen. Stat. §§ 113A-100 to 113A-128 (1987); Ohio, Shore Erosion Law, Ohio Rev. Code Ann. §§ 1507.01-1507.13, 1507.99 (Page 1986); Rhode Island, Wetlands Laws, R.I. Gen. Laws §§ 2-1-13 to 2-1-27 (1987), Coastal Resources Management Law., R.I. Gen. Laws §§ 46-23-1 to 46-23-18 (1987); South Carolina, Coastal Zone Management Act, S.C. Code Ann. §§ 48-39-10 to 48-39-220 (Law Co-op. 1987) Texas Coastal Management Plan Act, (Ch. 295, 1991 Tex. Sess. Law Serv. 1220 (Vernon); Virginia, Coastal Primary Sand Dune

also passed laws to control development in floodplains. The dangers that have prompted adoption of these laws are obvious and indisputable, and were not even questioned by the petitioner below. Yet now having avoided the making of a record that would drive home those dangers, petitioner suggests the South Carolina law has little to do with public health and safety, and that, in any event, he is entitled to compensation regardless of the dangers the law would curb.

A decision that adopts petitioner's radical reformulation of takings jurisprudence and that sanctions the procedural maneuvering by which petitioner averted any examination of the South Carolina law and the hazards it sought to control would gravely impair government in the exercise of its police power responsibilities. Ultimately, of course, it is not government that will suffer, but the citizens who depend on it for protection of their health and safety.

STATEMENT OF THE CASE

Petitioner, David H. Lucas, is the fee owner of two undeveloped, oceanfront lots located in the Wild Dunes Development on the Isle of Palms, a barrier island. In 1988 South Carolina's Coastal Zone Management Act was amended by the Beachfront Management Act. S.C. Code section 48-39-10 *et seq.* (the "Act"). The 1988 Act required the respondent to impose setback lines along the coast of South Carolina. These lines are referred to in the Beachfront

Protection Act, Va. Code Ann. §§ 62.1-13.21 to 62.1-13.28 (1987), Wetlands Act Va. Code Ann. §§ 62-13.1 to 62.1-13.20 (1987); and Washington, Shoreline Management Act of 1971, Wash. Rev. Code §§ 90.58.010-90.58.930 (Supp. 1987).

According to NOAA, the following 14 states implement NOAA-approved beach set-back laws: Maine, Delaware, Florida, Wisconsin, Rhode Island, Maryland, Alabama, Hawaii, New York, North Carolina, Michigan, New Jersey, South Carolina, Pennsylvania.

Management Act as a baseline and a setback line. No habitable structure can be built seaward of the baseline in this "critical area." The two lots owned by Mr. Lucas lie entirely seaward of the established baseline.[2]

Petitioner brought this action asserting that the restrictions on the use of his two lots amounted to a taking of his private property for public purposes, and that he was therefore constitutionally entitled to receive just compensation. (*See* Complaint, R. 5-8) The complaint did not challenge the constitutionality of the Beachfront Management Act nor did it contend that the Act's legislative purposes were not served by its application to petitioner's property.[3] Petitioner simply maintained that he was entitled to compensation under the Constitution of the United States and the Constitution of the State of South Carolina because he was deprived of the use of his property. *Id.*

Prior to trial, the parties stipulated that, under the Act, the methodology for setting the baseline is to determine the most landward position of the shoreline during the past forty years and to set a baseline at that point. Application of that methodology in this case resulted in a baseline that was entirely landward of Mr. Lucas' two lots (R. 13). At trial,

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2 The 1988 amendments were prompted by a report of an appointed Blue Ribbon Committee on Beachfront Management that had found the "South Carolina beach/dune system is...in a state of crisis" and that 57 of the State's 198 miles of shoreline were "critically eroding." One of the primary causes was poorly planned development which encroached upon the beach/dune system and accelerated its erosion. This system was the "first line of defense in protecting life and property against the ravages of storms and shoreline erosion." *Report of South Carolina Blue Ribbon Committee on Beachfront Management,* Myrtle Beach, 1987, pp. i, ii, 1-2.

3 Mr. Lucas' counsel acknowledged at trial that Mr. Lucas was not raising any issue as to the Act (R. 68), and the trial court so found in its final order (R. 125). Nor did Mr. Lucas ever challenge the location of the baseline (R. 40, 98).

petitioner's witness acknowledged the occurrence of severe beach erosion in the vicinity of the Lucas lots as recently as 1983 (R. 20-21). Mr. Lucas himself admitted that at that time the scarp line was at the face of one of the ocean front buildings in Wild Dunes (R. 37).

An expert in coastal engineering, testifying for the Council, stated that the interim baseline was set on the Lucas lots at "the most landward point of erosion or the most landward location of the shoreline over the last forty years," which occurred in 1963 (R. 71). The Act required this for "inlet erosion zones," which are particularly unstable. S.C. Code § 48-39-280. Petitioner's lots are in such a zone. Between 1957 and 1963, the area underwent severe erosion and the shoreline was "on the order of a hundred to a hundred and fifty feet behind the landward most lot line [of the Lucas property]" (R. 79; *see also* R. 83). As recently as 1973, the Lucas lots were partly covered by a tidal pond (R. 80). With respect to the erosion occurring in 1983, the expert testified that without emergency "shoal scraping" and subsequent beach nourishment, the house on lot 20, two lots to the west of the Lucas property, would have been threatened by erosion (R. 87-88).[4]

Lengthy revetments now lie to the east and west of the lots (R. 100-101). The area in the vicinity of the Lucas lots, according to the coastal engineer, is very dynamic and is subject to both erosion and accretion, depending upon the presence of offshore shoals (R. 76-77). Although it is not possible to predict the occurrence of shoals or periods in which they occur (R. 76-77), this expert thought it a "likelihood" that the shoreline could again recede as far back as the 1963 line (R. 80-81). It is possible, he pointed out, for

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4 The sand-scraping process requires the use of front end loaders to scrape sand from shoals at low tide and to put the sand in areas that require protection from erosion(R. 100-101).

a storm to remove hundreds of feet of beaches and dunes in just a matter of hours (R. 64).

The final order of the trial court found that the prohibition on construction deprived Mr. Lucas of any reasonable economic use of the lots, rendered them valueless, and effected a "total taking" (R. 127-129). On appeal, the Supreme Court of South Carolina reversed, ruling that Mr. Lucas was bound by the legislative findings that he did not contest, that prohibition of new construction in close proximity to the beach/dune area was necessary to prevent great public harm, and that the case was controlled by the nuisance exception to the Takings Clause recognized in *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470 (1987), and a long line of Supreme Court decisions. *Lucas v. South Carolina Coastal Council,* 404 S.E.2d 895 (S.C. 1991).

In 1990, the state legislature amended the Act to permit new construction seaward of the baseline pursuant to a special permit. S.C. Code Section 48-39-290(D). Under that amendment, Lucas could seek a permit to construct single family residences on the lots in question.

SUMMARY OF THE ARGUMENT

I. This appeal should be dismissed because petitioner never challenged the Act or its application to his property. One of the basic rules of this Court is that it does not decide questions that were not raised in the lower courts. Petitioner argues for the first time that the Act does not prevent harm. The amici States assert that the Act does prevent serious public harm and that this issue, with such wide-ranging implications for the States, should not be decided in the absence of an appropriate record. Moreover, because petitioner may have been entitled to a permit under

the 1988 Act as well as the 1990 amendments, his taking claim is not ripe for review. As an alternative, therefore, the Court could remand this case to enable petitioner to seek a permit.

II. Prohibition of permanent structures on the beach/dune system can help prevent erosion of the beaches and dunes and thus preserve the protection the dunes afford against storm surges and flooding. Wind-blown debris from houses destroyed by storms and hurricanes can be very destructive; the Act serves to reduce the hazards such debris poses to inland residents and property. Decisions of this Court have repeatedly held that uses of property with such attendant dangers and destructive effects can be prohibited without any requirement for compensation. Furthermore, because petitioner simply demanded compensation and never sought to challenge the purpose and operation of the Act, he did not prove a taking and is therefore not entitled to compensation.

III. All three factors under the *"ad hoc"* takings inquiry weigh in favor of South Carolina. In protecting lives and property, the Act serves the most compelling state interest. Given the exposed site of the property and its vulnerability to erosion or submergence, petitioner could not have had a reasonable expectation that it was suitable for permanent structures. The economic impact or the decline in value is not significant if it properly omits value created through public subsidies of various sorts. Government should not pay for the value it created when such value must be adjusted to protect the public health and safety or for value attributable to a harmful use.

ARGUMENT

I. BECAUSE PETITIONER FAILED TO CHALLENGE THE PURPOSES OR APPLICATION OF THE BEACHFRONT MANAGEMENT ACT AND FAILED TO SEEK A PERMIT, THIS APPEAL SHOULD BE DISMISSED.

Petitioner's brief argues for the first time in the course of this case that the Act was not directed at preventing public harm. (Br. at 38 *et seq.*) Petitioner never challenged the Act in the trial court and never asserted this argument in the appeal below. His seven page brief before the South Carolina Supreme Court merely argued that if he could not use his property, no matter the reason, he was entitled to compensation under the Fifth Amendment. He now asks this Court to rule categorically that the Act prevents public harm, if at all, in only the most marginal sense. The Court should not entertain this argument.[5]

It is an established principle of this Court that it does not decide questions not raised in the lower court. *Delta Airlines v. August,* 450 U.S. 346, 362 (1981); *Youakim v. Miller,* 425 U.S. 231, 234 (1976). That principle should apply with particular force here.

To construe the Act as petitioner asks would undercut the laws of every coastal state that restricts or prohibits

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5 The Supreme Court of South Carolina concluded that petitioner

> concede[d] that the beach/dune area of South Carolina's shores is an extremely valuable public resource, that the erection of new construction, *inter alia,* contributes to the erosion and destruction of this public resources; *and that discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm.*

Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 898 (S.C. 1991) (emphasis added).

construction on the beach/dune system and by extension many other laws similarly affecting building in areas subject to flooding and other known hazards. Petitioner has assiduously avoided pleading and trying an issue that would have enabled the Council to prove the very real dangers attendant to development on the beach/dune system. Those dangers cannot be adequately demonstrated for the first time in this Court. Nevertheless, because they are so acute, the amici States will discuss them in this brief.

Most importantly, the ruling petitioner seeks, that the Act and laws like it do not prevent harm, would be inappropriate in the complete absence of a relevant record. Little in the way of helpful guidance could be provided the other states that inevitably will be forced to defend their laws. Moreover, consideration of his argument would encourage other potential plaintiffs raising a takings claim to forego any challenge to similar laws in hopes of inducing the government not to make a record. Government, for reasons of economy, may understandably limit its defense to find, on appeal, that the burden of proof has shifted and it has only sparse legislative findings to rebut a statutory challenge.

Given petitioner's tactical choice and the fact that this Court has consistently recognized the nuisance exception to the Takings Clause, the States submit that the proper disposition of this case is dismissal, not remand. Petitioner is not entitled to another opportunity to try an issue he chose to concede. Should the Court not be inclined to dismiss, the States strongly urge that it remand the case for consideration of petitioner's entitlement to a permit under the 1988 or 1990 amendments to the Act and for development of a record, if necessary, on the harms the Act would prevent. Allowing a landowner to collect compensation without being required to seek a variance or other administrative relief is a severe intrusion on state prerogatives and would be financially disastrous to government. Such a result is clearly

contrary to this Court's precedents. *See Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 190 (1985), and *United States v. Riverside Bayview Homes*, 474 U.S. 121, 126 (1985).[6] The Takings Clause permits government to take and pay for property when necessary; it is not a grant of authority to courts or landowners to foist property upon states that do not want it.

II. GOVERNMENT REGULATION UNDER THE POLICE POWER DOES NOT AMOUNT TO A TAKING IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS WHERE IT PREVENTS A LANDOWNER FROM MAKING A HARMFUL USE OF HIS LAND.

A. Beachfront Protection Laws Serve Valid Police Power Purposes And Are Intended To Prevent Great Public Harm.

The South Carolina Beachfront Management Act of 1988, S.C. Code Section 48-39-10 *et seq.*, serves a number of critical purposes that are embodied in specific legislative findings. The Act includes findings that, *inter alia:*

> 1. The beach/dune system protects life and property by serving as a storm barrier which dissipates wave energy and contributes to shoreline stability in an economical and effective manner;
>
> 2. Many miles of South Carolina's beaches have been identified as critically eroding;
>
> 3. Development on the beach/dune system has jeopardized the stability of the system, accelerated erosion, and endangered adjacent property;
>
> 4. Erosion, although a natural process, becomes a significant problem for man only when structures are created in close proximity to the beach/dune system. It is in both the public and private interests to afford the beach/dune system space to accrete and erode in its natural cycle.

See S.C. Code section 48-39-250.

The Act therefore announced a policy to

> (1)protect, preserve, restore and enhance the beach/dune system, the highest and best uses of which are declared to provide:
>
> (a) a barrier and buffer from high tides, storm surge, hurricanes, and normal erosion....
>
> * * * *

S.C. Code section 48-39-260.

The severity and scope of the problem addressed — construction of buildings on the sand dunes — may not be fully conveyed by the characteristically terse legislative findings. Construction on the dunes can cause widespread and catastrophic harm. A full understanding of this problem dispels any suspicion that the intent of the Act was simply to ensure beaches attractive to tourists and that any prohibition

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6 The trial court ruled without explanation that administrative relief in the form of a permit was not appropriate (R. 125) although the 1977 Act in § 48-39-180 clearly contemplated such relief. The South Carolina Supreme Court did not address this issue, although it was preserved and argued by the council (R. 134 and Brief at 41). This Court has ruled that once a taking has occurred the government retains the option of withdrawing its action or exercising its eminent domain power. *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 321 (1987). Respondent was not afforded this option.

on construction was intended to benefit the many at the expense of the few.

The pernicious effects of construction on beach sand dunes are well documented in the legal and scientific literature. *See* Maloney and O'Donnell, *Drawing the Line at the Oceanfront,* 30 Fla.L.Rev. 383, 389-391 (1978); Hwang, *Shoreline Setback Regulations and the Takings Analysis,* 13 U. Haw. L. Rev. 1, 1-4, 37 (1991); Watson and Sedgley, *Land Use Regulation By the Virginia Marine Resources Commission,* 7 Va. J. Nat. Res. L. 381, 387-388 (1987); Skelton, *Houses on the Sand: Takings Issues Surrounding Statutory Restrictions on the Use of Oceanfront Property,* 18 B.C. Envtl. Aff. L. Rev. 125, 125-127 (1990); Comment, *Shifting Sands and Shifting Doctrines: The Supreme Court's Changing Takings Doctrine and South Carolina's Coastal Zone Statute,* 79 Calif.L.Rev. 205 (1991).[7] The beaches and near-shore sand system absorb the erosive force of ocean tides and waves and serve as natural storm breaks, buffering severe winds and tides before they reach more populous inland areas. Coastal dunes serve as reservoirs of sand, retaining wind-driven sand and supplying it to the beaches as they are worn down by wave action. The protective mass of dunes that are relatively intact provides

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7 These commentators cite such works as W. Kaufman & O. Pilkey, *The Beaches Are Moving: The Drowning of America's Shoreline* 27 (1979); P. Boaden & R. Seed, *An Introduction to Coastal Ecology* 129-134 (1985); L. White, *Life in the Shifting Sand Dunes* (1976); *Ecological Processes in Coastal Environments* (R. Jefferies & A. Davy eds. 1979); J. Titus, *The Causes and Effects of Sea Level Rise,* in Impact of Sea Level Rise on Society (H. Wind ed. 1987); Owens, *Where Erosion and Development Meet,* EPA Journal, Sept.-Oct. 1989 at 45; Pilkey, *America's Beaches: An Endangered Species?,* SEA Grant Today, Nov.-Dec. 1981 at 14: I. McHarg, *Design With Nature* 7 (1969). *See also* R. Weggel, S. Brown, and E. Doheny, "The Cost of Defending Developed Shorelines Along Sheltered Waters of the United States" in USEPA *The Potential Effects of Global Climate Change on the United States,* (USEPA EPA-230-05-89-050, Washington, D.C. December 1989).

flood protection during storm surges.[8] When the dune system can no longer renourish the beach, the erosion will accelerate and may eventually reach structures on the dunes.

Development along barrier islands and sand dunes has the effect of damaging and eroding the natural sand dune barrier both by displacing and destroying the dune and by eliminating stabilizing vegetation. *See,* Comment, *supra,* 79 Calif.L.Rev. 213-214. Another commentator has observed:

> Although any beach will change with time, those on which the dunes are left relatively undisturbed stand the best chance of surviving with minimal change. The developed areas south of Virginia Beach are prime examples of these phenomena. There, the beaches are widest where beach structures are placed behind the primary row of sand dunes, walkways are constructed over rather than through the dunes, sand fences are placed to aid the natural processes of dune building, and appropriate vegetation is planted on newly-formed dunes. Where these precautions are not observed, or where the dunes have been leveled to make room for homes, the beach is narrower; in some cases the waves now break under the pilings that support the homes.

Watson and Sedgley, *supra,* 7 Va. J. Nat.Res.L. 387-388 (footnotes omitted).

The dangers of development upon the beach/dune system are wide-ranging and threatening to public safety as well as

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8 J. Clark, *Coastal Ecosystem Management: A Technical Manual for the Conservation of Coastal Zone Resources,* pp. 318, 336, 566; Report of the Barrier Island Work Group, U.S. Department of Interior (1978) ("Barrier Island Work Group Report") at 13.

public resources. This problem will only worsen as sea levels rise.[9] As beachfront homes, hotels and other structures proliferate, inland flood protection is reduced. Beachfront structures are themselves particularly vulnerable to destruction by hurricanes and severe storms and their wind-driven debris may severely damage more inland houses and structures.[10] Where beachfront development is dependent upon septic tanks, storms may transport their contents into valuable bays and estuaries, preventing the harvesting of shellfish and other marine resources. Infrastructure created at public expense to serve and sustain beachfront development — e.g., roads, bridges, telephone and electric lines, gas lines, water and sewer lines — may be damaged or destroyed by severe storms. The public bears the risk of greater damage caused by increased flood hazards and wind-driven debris. The public likewise bears the cost of disaster relief and repair and replacement of infrastructure that principally

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9 Rising sea levels will exacerbate erosion, increase the loss of protective beaches and provide a higher base level for storm surges. *See* Titus, "Greenhouse Effect, Sea Level Rise and Coastal Zone Management," 14 *Coastal Zone Management Journal No. 3* at 155 (1986). A hurricane's storm surge may range from 4 to 20 feet above sea level. *See* Godschalk, Brower and Beatley, "Catastrophic Coastal Storms" at 19 (Duke University Press 1989).

Hurricane Hugo, which struck South Carolina in 1989, caused a storm surge 20 feet above mean sea level to sweep over three developed barrier islands, including the Isle of Palms, off Charleston, S.C. See Platt, Bretley and Miller, "Coastal Erosion: Our Retreat from the Tide," *Environment,* Nov. 1991.

10 *See* discussion in Comment, *Shifting Sands and Shifting Doctrines, The Supreme Court's Changing Takings Doctrine and South Carolina's Coastal Zone Statute,* 79 Calif.L.Rev. 205, 212-213 (1991), of the 29 deaths and $6 billion in property damage Hurricane Hugo caused in 1989 in South Carolina alone. The author suggests that "[m]uch of the damage was likely the result of coastal zone mismanagement."

In South Carolina even storm resistant structures were damaged by debris from other houses. Coch, Nicholas K. and Manfred P. Wolff, "Effects of Hurricane Hugo Storm Surge in Coastal South Carolina," *Journal of Coastal Research.* Special Issue No. 8. Spring 1991.

benefit the beachfront property owner. Even where the only immediate injury may be a receding shoreline caused by accelerated erosion, it is generally the public that must pay for extremely costly beach renourishment projects.[11]

The question presented by this case is not simply the question of what the South Carolina law would do to the owner of the beachfront lot, but what harm that owner, and others similarly situated, would do to the property and resources of others. As Professor Sax has written:

> Property does not exist in isolation. Particular parcels are tied to one another in complex ways, and property is more accurately described as being inextricably part of a network of relationships that is neither limited to, nor usefully defined by, the property boundaries....Frequently, use of any given parcel of property is at the same time effectively a use of, or a demand upon, property beyond the border of the user.

Sax, *Takings, Private Property and Public Rights,* 81 Yale L.J. 149, 152 (1971).

B. Prohibition Of A Harmful Use Of Property Does Not Constitute An Unconstitutional Taking Of Property Even If There Is No Other Economically Viable Use.

Under the common law all property was deemed held subject to the maxim *"sic utere tuo ut alienum non laedas"* (use your own property in such a manner as not to injure

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11 Federal costs for Hurricane Hugo were $1.6 billion for disaster relief and $364 million for flood insurance payments. GAO Report. 1991. "Disaster Assistance: Federal, State, and Local Responses to Natural Disasters Need Improvement." Report to Congressional Requesters. GAO/RCED-91-43.

that of another). In 1987 this Court reaffirmed the vitality of the maxim in the face of a Fifth Amendment takings challenge:

> While each of us is burdened somewhat by...restrictions [on use of property], we, in turn, benefit greatly from the restrictions that are placed on others. [Citations omitted.] These restrictions are "properly treated as part of the burden of common citizenship." [Citation omitted.] Long ago it was recognized that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community," *Mugler v. Kansas,* 123 U.S. at 65...*and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it.*

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491-492 (1987) (emphasis added).[12]

Keystone addressed a number of important questions that had clouded the field of takings jurisprudence. First, in distinguishing *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922), the decision stated that that was the "case of a

12 Justice O'Connor, dissenting in *Keystone, supra,* subsequently, in *First English Evangelical Lutheran Church v. Los Angeles County,* 482 U.S. 304, 362 (1987), concurred in the dissenting opinion of Justice Stevens that reiterated the principles of *Keystone.* The majority decision in *First English* did not determine whether a taking existed on the facts alleged but rather decided the strictly legal question of whether a temporary taking would require compensation to the property owner. On remand, the California appellate court, relying heavily on Justice Stevens' dissent, found that an interim county ordinance prohibiting construction in a floodplain did not constitute a taking. *First English Evangelical Lutheran Church v. County of Los Angeles,* 210 Cal.App.3d 1353, 258 Cal.Rptr. 893 (Cal.Ct.App. 1989), *cert. denied,* 493 U.S. 1056 (1990).

single house," that the interests in conflict were private, and that the Kohler Act, which sought to prevent subsidence caused by mining, was not aimed at protecting the public but rather sought only a "balancing of the private economic interests of coal companies against the private interests of the surface owners." *Keystone, supra,* at 485. Justice Holmes, in writing for the majority, had not taken issue with Justice Brandeis' opinion that the State has an absolute right to prohibit land use that amounts to a public nuisance but simply had disagreed with Justice Brandeis over whether the Kohler Act represented such a prohibition. *Id.* at 488 n. 17.

Second, the Court made it clear that *Pennsylvania Coal* had not overruled *Mugler v. Kansas,* 123 U.S. 623 (1887), and a long line of cases that stood for the proposition that a

> prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or appropriation of property....

Keystone, supra, at 489 (quoting *Mugler, supra,* at 668-669). The *Keystone* decision pointed directly to *Miller v. Schoene,* 276 U.S. 272 (1928), decided just five years after *Pennsylvania Coal* by a unanimous Court. In *Miller,* the Court held that the Takings Clause did not require the State of Virginia to compensate the owners of infected cedar trees for the value of the trees that State had ordered destroyed. *Miller* ruled that the State did not exceed its constitutional powers by deciding to *destroy* one class of property (healthy cedar trees) in order to save another which was, in the judgment of the Virginia legislature, of greater value to the public (apple trees). Here, South Carolina has chosen to limit one property interest to preserve other property, public resources *and* the public safety.

The Court noted in *Keystone* that it had "repeatedly upheld regulations that destroy or adversely affect real property interests," 480 U.S. at 488 n. 18, and the fact that a property owner was denied the "economically viable use of his land," although recognized as a factor in takings analysis, would not require compensation where "the public interest in preventing activities similar to public nuisances is a substantial one...." *Id.* at 492. *Mugler, supra,* said expressly that the police power would tolerate the "destruction of property" to abate a public nuisance, see 123 U.S. at 669, and *Miller v. Schoene,* 276 U.S. at 279-280, said exactly the same thing, relying on *Mugler, Hadacheck v. Los Angeles,* 239 U.S. 394 (1915), and a host of other cases. In *Hadacheck,* this Court, acknowledging that petitioner's brickyard was "a business, lawful in itself," and that the clay found on petitioner's property could not be economically transported elsewhere, nevertheless ruled that the business could be terminated by the lawful exercise of the police power, "one of the most essential powers of government, one that is the least limitable." 239 U.S. at 410. This Court therefore affirmed the California Supreme Court, which, it pointed out, had decided the case "from the standpoint of the offensive effects of the brickyard and not from the deprivation of the deposits of clay...." 239 U.S. at 411. *Hadacheck* thus echoes, although it does not cite, a case decided one year earlier, *Atlantic Coast Line Railroad Co. v. City of Goldsboro,* 232 U.S. 548 (1914), wherein this Court opined that "the State, in the exercise of the police power, may legitimately extend the application of the principle that underlies the maxim *sic utere tuo ut alienum non laedas,* so far as may be requisite for the protection of the public." *Id.* at 558.

In *Keystone* the dissenting opinion suggested that the nuisance exception applied only to "misuses" of property, not "legal" uses. *See Keystone, supra,* at 512 (Rehnquist, C.J., dissenting). There is, however, no clearcut and controlling distinction between a "legal use" and a "misuse" of property.

Curtin v. Benson, 222 U.S. 78 (1911), does not establish such a dichotomy because there the use, grazing cattle, was legal and did not cause any harm. *Hadacheck,* decided after *Curtin v. Benson,* expressly rejected the argument that "a necessary and lawful occupation that is not a nuisance *per se* cannot be made so by legislative declaration." 239 U.S. at 410. The police power allows the State "to declare that in particular circumstances and in particular localities a livery stable shall be deemed a nuisance in fact and a nuisance in law." *Id.* at 411 (quoting *Reinman v. Little Rock,* 237 U.S. 171 [1915]). *See also Goldblatt v. Town of Hempstead,* 369 U.S. 590 (1962), a hazard-related case in which the town prohibited sand and gravel mining below the water table to prevent formation of dangerous pools of water. Petitioner's land had no other apparent economic use. This Court, relying on, *inter alia, Hadacheck, Reinman* and *Mugler,* ruled that an otherwise valid exercise of the police power that deprives property of its most beneficial use is not unconstitutional.

Thus, under this theory, even certain residential development, because of untoward effects, can be prohibited as a nuisance in fact and in law. In *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 395-396 (1926), the Court stated that apartment houses, while highly desirable in the proper environment, "come very near to being nuisances" in areas dedicated to private homes. The question is one of effects. This being so, development that is destructive to an essential safety feature of a barrier island can rightly be deemed a nuisance. *See McNulty v. Town of Indialantic,* 727 F.Supp. 604 (M.D. Fla. 1989) (upholding ordinance prohibiting residential structures seaward of setback line). *See also McCarthy v. City of Manhattan Beach,* 41 Cal.2d 879, 264 P.2d 932 (Cal. 1954) (sustaining zoning ordinance that restricted oceanfront property to beach recreation uses because site was subject to erosion and wave damage and safety of residences would be in question).

Under the foregoing authority, state and local governments have always had broad powers to prevent or abate harmful uses of property. They must retain the authority to deny development that has harmful effects without fear of incurring massive liability. This fear is of particular concern in view of their liability under *First English, supra,* for even temporary takings. Petitioner's reformulation of takings jurisprudence would require compensation *whenever* a property owner cannot use his land without causing serious harm. Given the tendency of many developers to propose high density development as the only feasible economic use of their land, such a principle could be devastating to government. *See, e.g., Graham v. Estuary Properties, Inc.,* 399 So.2d 1374 (Fla. 1981), *cert denied sub nom., Taylor v. Graham,* 454 U.S. 1083 (1981) (proposing 26,500 dwelling units on 1,800 acres of mangroves as the only viable use). Many governments, fearful of having to purchase such land at its "highest and best use," may well abandon effective regulation. Historically, however, the principle has been clear: government is not compelled to regulate by purchase. *Andrus v. Allard,* 441 U.S. 51, 65 (1979).

C. The Petitioner Has Not Proved A Taking, Having Conceded That Building On The Beach/Dune System Would Be Harmful.

The Beachfront Management Act, if implemented, will protect lives, property and other resources. The petitioner conceded as much in the proceedings below. The record shows that the Lucas property lies foursquare on the area of the beach that the Act is intended to protect. It could not be more exposed to storms and hurricanes. Just within the last three years, Hurricane Hugo caused many deaths and billions of dollars in property damage along the coast of South Carolina and created a twenty-foot storm surge that swept across three barrier islands. *See* notes 9 and 10, *supra.*

There is no disputing that construction of permanent buildings on the beach/dune system constitutes a clearcut danger not just to the individuals who occupy those structures but to those landward whose protection against flooding is reduced and whose exposure to wind-driven debris materially increased. The petitioner never sought to join issue on these facts when he filed his lawsuit to compel purchase of the lots. He did not begin to meet his burden of proof to show that the law was unreasonable. *See Goldblatt, supra,* at 596 (exercise of the police power is presumed to be constitutionally valid, and burden is on one challenging ordinance to prove it unreasonable). The single question the petitioner posited in the absence of any challenge to *either* the purposes of the South Carolina law *or* whether those purposes were served by the denial of permanent structures on his property was simply whether he was entitled to compensation. This Court addressed precisely such a claim in *Keystone:*

> "[T]he issue of compensation cannot arise until the question of justification has been disposed of. In the typical nuisance prevention case, the question is resolved against the claimant."

480 U.S. at 492 n. 22, quoting R. Epstein, *Takings* (1985). Petitioner conceded justification. He has not, therefore, proved a taking, and he is not, therefore, entitled to compensation.

D. Laws Intended To Prevent Harmful Uses Of Property Are Constitutional If Not Unnecessarily Harsh, But The State's Determination Of Legitimate Public Purposes Is Entitled To Substantial Judicial Deference.

The *amici* States acknowledge that government is not free to act arbitrarily in the exercise of the police power to

prevent harms. Although the judiciary does not "sit as a 'superlegislature to weigh the wisdom of legislation,'" *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 124 (1978) (quoting *Ferguson v. Skrupa,* 372 U.S. 726, 731 [1963]), it may nevertheless examine a law to determine whether it "bears a reasonable relation" to a "legitimate government purpose." *Exxon Corp., supra,* at 124-125. Under the Fifth Amendment Takings Clause, the court has indicated that the law must "substantially advance a legitimate state interest." *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987). The concern for public health and safety may not be invoked to justify means not reasonably — or in this case substantially — related to the achievement of public protection, and *unnecessary* harshness in such means should not survive the test.

Such a test is consistent with *Pennsylvania Coal.* When Justice Holmes wrote of a "regulation [that] goes too far" he was speaking of its character, not the degree of restriction, for, as an example, he pointed to the permissible destruction of a house to stop a conflagration. It is the *nature* of a regulation that is critical. *Keystone, supra,* at 488.

There can be no question that prohibition of permanent buildings on the beach/dune system *substantially* advances the interests embodied in the South Carolina Beachfront Management Act and other state laws for the protection of coastal areas. There is uncontradicted evidence in the record that South Carolina's "inlet erosion zones" and "standard erosion zones" have very different patterns of erosion and accretion and that inlet erosion zones can rapidly erode and accrete over hundreds of feet. Although harsh, the prohibitions

of the 1988 Act are not unnecessarily so. Until now, the Petitioner has not even attempted a contrary argument.[13]

Likewise, there can be no question as to the *legitimacy* under the police power of the purposes served by the Act. Although the petitioner now questions those purposes, the States submit that this Court has historically deferred to the legislative branch of government on this issue, and that such deference is in order here. In the exercise of the police power, "the largest discretion is allowed." *Mugler, supra* at 669, quoting *Stone v. Mississippi,* 101 U.S. 814 (1880). *See also, Hadacheck, supra,* at 410; *Goldblatt, supra,* at 596; *Reinman, supra,* at 177; *Powell v. Pennsylvania,* 127 U.S. 678, 685 (1888). A legislature may decide one class of property

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13 In contrast, *Nollan, supra,* involved the notion that requiring an oceanfront property owner to dedicate an easement to the public over his private beach area would somehow promote "visual access" to the beach from the public road on the *opposite* side of the property and thus promote public access to the public part of the beach. The Court rejected this contention.

More on point, state courts, for example, have recognized that flood hazards may justify a prohibition on residential and other construction. *See, e.g., Maple Leaf Inv., Inc. v. State Dept. of Ecology,* 88 Wash.2d 726, 565 P.2d 1162 (1977); *Turnpike Realty Co. v. Town of Dedham,* 362 Mass. 221, 284 N.E.2d 891 (1972), *cert. denied,* 409 U.S. 1108 (1973); *First English v. County of Los Angeles,* 210 Cal.App.3d 1353, 258 Cal. Rptr. 893 (Cal.App. 1989), *cert. denied,* 493 U.S. 1056 (1990); *Turner v. County of Del Norte,* 24 Cal.App.3d 311, 101 Cal. Rptr. 93 (Cal.App. 1972). *See also, Pope v. City of Atlanta,* 242 Ga. 331, 249 S.E.2d 16 (1978), *cert. denied,* 440 U.S. 936 (1979); *Usdin v. State, Dept. of Envtl. Protection,* 173 N.J.Super. 311, 414 A.2d 280 (1980), *aff'd,* 430 A.2d 949 (N.J. 1981). State courts have also upheld the denial of permits, reasoning that certain property is inherently unsuited to development. *State of New Hampshire Wetlands Bd. v. Marshall,* 127 N.H. 240, 500 A.2d 685, 689 (1985); *Claridge v. New Hampshire Wetlands Board,* 125 N.H. 745, 485 A.2d 287 (1984); *Rowe v. Town of North Hampton,* 131 N.H. 424, 553 A.2d 1331 (1989); *Just v. Marinette County,* 56 Wisc.2d 7, 201 N.W.2d 761 (1972); *Carter v. South Carolina Coastal Council,* 281 S.C. 201, 314 S.E.2d 327 (1984); *Graham v. Estuary Properties, Inc.,* 399 So.2d 1374 (Fla.), *cert. denied sub. nom., Taylor v. Graham,* 454 U.S. 1083 (1981).

(infected cedars) must be destroyed to save another (apple trees), and the Court need not "weigh with nicety the question whether the infected cedars constitute a nuisance according to common law; or whether they may be so declared by statute." *Miller v. Schoene, supra,* at 279-280.

The Court's recent decision in *Keystone* reaffirmed this deference, noting that the lower courts in that case "were both convinced that the legislative purposes set forth in the statute were genuine, substantial, and legitimate, and we have no reason to conclude otherwise." 480 U.S. at 486. Although a court may examine a statute to determine whether its details call into question its stated public purposes, *id.* at 487 n. 16, no such inquiry was sought in the lower courts in this case and none should be undertaken now. As Justice Stevens has written, "[a] presumption of validity is particularly appropriate...because the complaint did not even allege that the ordinance is invalid, or pray for a declaration of invalidity or an injunction against its enforcement." *First English Evangelical Lutheran Church, supra,* at 327 (Stevens, J., dissenting).

III. EVEN IF THE ACT DOES NOT PREVENT A NUISANCE USE OF PROPERTY, PETITIONER SHOULD NOT BE ENTITLED TO COMPENSATION ON THIS RECORD.

Should the Court decide that *Mugler* principles are not controlling here and that it should proceed itself with the *ad hoc* inquiry of *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 124 (1978), there are a number of facts that suggest Mr. Lucas is not entitled to compensation, or at least to the amount the trial court awarded. The three factors considered under the ad hoc inquiry are: (1) the character of the government action; (2) the extent to which the regulation has interfered with distinct investment-backed

expectations; and (3) the economic impact of the regulation on the claimant. *Id.* at 124. These factors do not weigh in petitioner's favor.

First, the Act, as Mr. Lucas conceded, protects lives and property, a most compelling state interest. He had the burden to prove a law passed as a safety measure was unreasonable, *Goldblatt, supra,* and he did not attempt to do so. The law is therefore presumed constitutional. *Id.*

Second, Mr. Lucas knew that the area has been, and continues to be, subject to erosion. Revetments have been constructed to the east and west of his lots to control erosion. Those lots have been part of the active beach fifty percent of the time for the last forty years (R. 84). Within the last thirty years, the shoreline lay landward of the Lucas property; within the last twenty years, the lots remained at least partly ponded; within the last ten years, the erosion of a neighboring oceanfront house was prevented only by emergency action. Under the 1977 Act, the front dune of a beach was part of the "critical area" in which habitable structures were prohibited. Given the history and instability of this area, landward migration of the critical area was easily foreseeable. In view of his lengthy involvement with the development of Wild Dunes Mr. Lucas should have known that habitable structures on the lots would be highly exposed to storms and hurricanes. It was not reasonable for Mr. Lucas to have concluded that residential use was the "highest and best use" or even a feasible use of these lots. "[D]istinct investment-backed expectations are reasonable only if they take into account the power of the state to regulate in the public interest." *Pace Resources, Inc. v. Shrewsbury Township,* 808 F.2d 1023, 1033 (3d Cir. 1987). His investment-backed expectation was highly uncertain from the beginning.

The trial court's conclusions as to economic impact are questionable. Courts have concluded that oceanfront land retains substantial value even if habitable structures cannot be built thereon. *McNulty, supra,* at 608. Diminution in value alone does not constitute a taking. *Penn Central, supra,* at 131. Mr. Lucas' right to put a trailer on the property has, in similar circumstances, been deemed a reasonable use sufficient to withstand a takings claim. *See Hall v. Board of Environmental Protection,* 528 A.2d 453 (Me. 1987) (construing state constitution).

The finding that the two lots were worth $1,170,000 is particularly unpersuasive, and diminution in value should not be measured from this inflated figure. Much of the value of these lots for construction purposes, as with any property in exposed and hazardous areas, is largely owed to supportive (and likewise vulnerable) public infrastructure, available disaster relief and publicly subsidized flood insurance. *See National Flood Insurance Program,* 42 U.S.C. §§ 4001-4128. The innate value of the lots for other purposes remains undisturbed. If value the government itself has created must be adjusted through regulations in order to protect public health and safety, loss of this value should not be considered a taking; nor should loss of value that is based on a harmful use. Government should not have to pay compensation for the choices it must make to resolve conflicting demands, and to protect some rather than others. *See* Sax, *supra,* at 153-161; *Miller v. Schoene, supra. See also* Anderson, *Takings and Expectations: Toward a "Broader Vision" of Property Rights,* 37 Kan. L. R. 529 (1989). The Act is a clear decision to afford less public support to the most vulnerable property (note the Act's restrictions on rebuilding in the dune area, § 48-39-290) and more protection to inland dwellers.

Decisions about public safety are the most important and basic the government makes and they should not be displaced by courts in the absence of an appropriate record. Hurricanes and severe storms are deadly phenomena. Government cannot in circumstances such as these protect everyone, but doing nothing is simply an abdication of its fundamental responsibility to the larger community. It must not be required to pay compensation because of a necessary choice.

CONCLUSION

This appeal should be dismissed. In the alternative, the judgment may be vacated to enable petitioner to apply for a building permit pursuant to the 1988 and 1990 amendments.

ROBERT A. BUTTERWORTH
Attorney General of Florida
LOUIS F. HUBENER
Assistant Attorney General
Counsel of Record
DEPARTMENT OF LEGAL AFFAIRS
The Capitol — Suite 1502
Tallahassee, FL 32399-1050
(904) 488-9935

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No. 91-453

In the
Supreme Court of the United States
October Term, 1991

DAVID H. LUCAS,
Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of South Carolina

BRIEF OF DEFENDERS OF PROPERTY RIGHTS, AMERICAN SHEEP INDUSTRIES ASSOCIATION, INC., ENVIRONMENTAL CONSERVATION ORGANIZATION, LAND IMPROVEMENT CONTRACTORS ASSOCIATION, & OUTDOOR ADVERTISING ASSOCIATION OF AMERICA, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Nancie G. Marzulla
President and Chief
Legal Counsel
6235 33rd Street, N.W.
Washington, D.C. 20015
(202) 686-4197

Counsel for Amici Curiae

December 31, 1991

DEFENDERS OF PROPERTY RIGHTS

QUESTIONS PRESENTED

1. Whether a statute which deprives a property owner of all of the economic value of his land goes too far and thus will be recognized as a taking?

2. Whether the Government must bear the burden of proving a nuisance defense of a taking claim?

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Pursuant to Rule 37.3 of the Rules of this Court, *Amici* in Support of Petitioner submit this brief *amici curiae*. The *amici* support reversal of the decision by the Supreme Court of the State of South Carolina.

INTEREST OF *AMICI CURIAE*

Defenders of Property Rights is a non-profit, public interest law foundation whose members are property owners, users and beneficiaries of the rights protected by traditional Anglo-American property law. Incorporated under the laws

of the District of Columbia, Defenders of Property Rights is designed specifically for the purpose of participating in legal action affecting the public interest and the private property rights of its membership. Defenders of Property Rights engages in litigation around the country on behalf of its membership in defense of property interests protected against government incursion by the Bill of Rights. Defenders of Property Rights has devoted a significant portion of its resources to the litigation of regulatory taking issues.

American Sheep Industries Association, Inc. is an organization of 109,000 sheep producers including 47 state associations and 20 affiliated organizations. The Association is dedicated to the protection of the rights of property use and ownership as essential elements in the sheep production industry.

The Environmental conservation Organization is a national organization of landowners and landowner associations working to balance environmental protection with economic vitality.

Land Improvement contractors Association is a 40-year old organization of building and construction contractors whose industry is dramatically impacted by zoning and land use regulations. The Association has been active at the national and local levels on behalf of its members in opposing unnecessary and excessively burdensome restrictions upon the use of private property.

The Outdoor Advertising Association of America, Inc. ("OAAA") is a national organization comprised of billboard and outdoor sign owners. Outdoor advertising is pervasively regulated through the zoning process and by other

mechanisms at the national, state and local levels. These regulations are often confiscatory. OAAA has been active for many years in the courts, Congress and in state legislatures in defense of the property rights of its members.

STATEMENT OF THE CASE

This case affords an opportunity to complete the unfinished business left open by the alternative tests set forth in *Agins v. City of Tiburon*, 447 U.S. 225 (1980),[1] where this Court stated:

> The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land.

Id. at 260. (Citations omitted).

While this Court made clear in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), that the first half of this alternative test is satisfied if the governmental action does not substantially advance the stated government purpose, lower courts require an equally clear articulation that a taking will also be recognized where the owner has been deprived of the economically viable use of his land.

Despite the court's repeated statement of the alternative test, lower courts have been reluctant to find a taking solely on the basis of deprivation of economic viability. As a

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[1] Since *Agins* did not involve a total deprivation of all economic value, the issue was not before the Court at that time.

result, courts have tended to indulge in a "belt and suspenders" approach to taking analyses even when the diminution in value has been complete, analyzing at length other factors which would seem to be extraneous under the plain language of the second half of the alternative test of *Agins*.[2]

The South Carolina Supreme Court clearly did not believe that this Court meant what it said in *Agins*, and thus refused to find a taking despite the deprivation of all economic value. This case squarely poses an instance in which a regulation deprives the property of all economic value requiring that this Court ascertain the vitality of the rule which it enunciated in *Agins*.

SUMMARY OF ARGUMENT

The Fifth Amendment to the United States Constitution, as applied to South Carolina through the Fourteenth Amendment, demands that Petitioners receive just compensation for the taking of their property under the South Carolina Coastal Council's beach management regulatory scheme. By statutorily mandating setback lines which prohibit the construction of any permanent structure such as a house or other habitable dwelling, South Carolina has deprived Petitioner of 100 percent of the economically

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[2] *See, e.g., Loveladies Harbor v. United States*, 21 Cl. Ct. 153 (1990), *appeal filed*, No. 91-5050 (Fed. Cir. argued Nov. 1991); *Florida Rock Industries, Inc. v. United States*, 8 Cl. Ct. 160, 179 (1985) *reversed on other grounds*, 791 F.2d 893 (Fed. Cir. U.S. 1054 (1987), *on remand*, 21 Cl. Ct. 161 (1990); and *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394 (1989), *modified*, 20 Cl. Ct. 324 (1990), *aff'd*, 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied*, U.S. (1991).

viable use of the property. A statute which results in the total deprivation of all the economic value of private property must be recognized as a taking in violation of the Fifth Amendment. Any holding short of that eviscerates the plain meaning of this constitutional guarantee.

Courts must look beyond broad legislative pronouncements determining whether a taking has occurred. To sustain a holding that a proposed use of property constitutes a nuisance (and therefore as a defense to a taking claim) there must be proof that actual public harm would be inflicted by that use. In this instance, the lower court relied only upon the legislative findings supporting the statute and, therefore, failed to ascertain whether Lucas' proposed use would indeed constitute a public nuisance.

I. A Statute Which Goes Too Far in Regulating Private Property Will be Recognized as a Taking

The United States Constitution limits the exercise of South Carolina's regulatory authority. The United States Constitution provides that private property shall not be "taken for public use, without just compensation." *U.S. CONST. amend. V.* The Taking Clause of the Constitution does not forbid the exercise of otherwise legitimate governmental authority. Instead, it places a condition upon the exercise of that authority, requiring that just compensation be paid when the governmental action amounts to a taking.

"This basic understanding of the [Fifth] Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but to secure *compensation* in the event of otherwise proper interference

amounting to a taking." *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 315 (1987).

This constraint upon the exercise of governmental power is a guarantee "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see also Penn Central Transportation Co. v. New York*, 438 U.S. 104 (1978).[3]

The right to just compensation does not depend upon the importance of the public policy underlying the regulation which results in a taking. "A strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).[4]

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[3] *American Savings and Loan Association v. County of Marin*, 653 F.2d 364, 372 n.1 (9th Cir. 1981) ("Courts faced with particular challenges to zoning measures must nonetheless ask whether those measures exact such a disproportionate sacrifice from individual property holders relative to their peers and to their expectations that the affected individuals may be seen as having been treated solely as a means in a process of social engineering."); *Pennell v. City of San Jose*, 485 U.S. 1, 9 (1988). (The Fifth Amendment's just compensation provision is designed to bar the government from foisting a disproportionate burden upon a particular group of individuals for a harm which is public and whose burden should be shared by the public as a whole.)

[4] In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the U.S. Supreme Court invalidated a building permit condition which would have allowed public access over the landowners' private (continued...)

Of course, not every exercise of regulatory authority constitutes a taking of private property. Whether a taking has occurred depends upon the extent to which the regulation impacts the owners' constitutionally protected property rights. "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal* at 415.

A. A Statute Which Deprives Property of All Economic Value Goes Too Far and Will be Recognized as a Taking

The plain meaning of the Takings Clause is that the government may not deprive the owner of the entire value of his property while withholding compensation. This principle is fundamental to the condemnation process, which recognizes the government's right to take part or all of the owner's private property but ensures that he will receive just compensation for it. The same principle applies where the government has taken physical possession of the property,

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[4] (...continued)
beach, saying:

> The Commission may well be right that [public access to the beach] is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. Rather, California is free to advance its 'comprehensive program,' if it wishes, by using its power of eminent domain for this 'public purpose' . . . but if it wants an easement across the Nollan's property, it must pay for it. *Id.* at 841-42.

rendering it valueless to the owner. *United States v. Causby*, 328 U.S. 256, 261 (1945); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). And a regulation "goes too far" when, like condemnation and physical possession, it empties the property of all value. *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394 (1989), *modified*, 20 Cl. Ct. 324 (1990), *aff'd*, 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied*, U.S. (1991).

A regulation which "goes too far" will be recognized as an unconstitutional taking. *Pennsylvania Coal v. Mahon*, *supra*. Certainly a regulation can go no farther than to eliminate the entire economic value from the property. Indeed, the market value of a parcel of property is a surrogate for the bundle of rights which is property ownership. When a property lacks economic value, the marketplace is affirming that the bundle of private property rights is empty or has been destroyed.[5]

The United States Supreme Court has repeatedly held that the deprivation of a fundamental property right constitutes a

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[5] Even nominal market value of property is an insufficient basis to preclude a finding of taking when all viable economic activity has been destroyed. "There are invariably speculators willing to gamble that even the most severe restrictions will eventually be lifted or modified so as to render the property usable again. If the existence of such a residual market for the property could defeat a claim for a regulatory taking, no regulatory taking could ever be proved and the concept would be rendered meaningless. In fact, when courts have determined that property has been rendered unfit for economically viable activity, they have found a Fifth Amendment taking even though the property obviously continued to have market value." *Florida Rock Industries, Inc. v. United States*, 8 Cl. Ct. 160, 167 (1985).

taking. Describing the incidents of property ownership as a "bundle of sticks," the Court has cautioned that "the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Andrus v. Allard*, 44 U.S. 51, 66 (1979). However, a regulation which deprived an Indian of the "right to pass on property -- to one's family in particular -- [which] has been part of the Anglo-American legal system since feudal times" so impairs this bundle of rights as to constitute an invalid taking without just compensation. *Hodel v. Irving*, 481 U.S. 704, 717 (1987). Likewise, the assertion by the United States of a navigational easement over a formerly private waterway unconstitutionally deprived the owner of "one of the most essential sticks in the bundle of rights that are commonly characterized as property -- the right to exclude others." *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). *See also Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) (deprivation of the right to exclude public from owner's private beach constitutes a taking).

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), this Court invalidated a city ordinance which required installation of a cable television receiver box on all apartment buildings in New York. Characterizing the installation of the box as a physical invasion, the Court found that this invasion "chops through the bundle taking a slice of every strand." *Id.* at 437. "[T]he permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessary use of the property. Although deprecation of the right to use and obtain a profit from property is not, in ever case, independently sufficient to establish a taking (citations omitted), it is clearly relevant." *Id.*

In *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394 (1989), *modified*, 20 Cl. Ct. 324 (1990), *aff'd* 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied*, U.S. (1991), a statute prohibiting the mining of a coal deposit was recognized as a taking of the entire economic value of the coal:

> This case presents a dispute where a proper government purpose, protecting agricultural land, must be balanced against the absolute diminution in value of the property at issue that the court has found. Logically, when a diminution in value is absolute, a taking is more easily found. . . . In the case at hand, the diminution in property value is total, and there is no public interest in causing plaintiffs to solely bear the burden of maintain[ing] the AVF [alluvial valley floor] protected by SMCRA.

Id. at 406.

Finally, in *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990), a denial of a permit to fill the plaintiff's property was recognized as a taking because it took virtually the entire value of the land:

> The location of the lot makes it improbable that a single home would be built on, it is more likely than not that this acre will remain an empty lot, and therefore although it was not included in the permit application, the denial of the permit effectively renders this acre without economically viable use, as well as the 11.5 acres of wetlands."

Id. at 159. *See also Florida Rock Industries, Inc. v. United States*, 8 Cl. Ct. 160, 179 (1985) ("[W]hen government treats

private land as if it were its own, ignoring the interest of the property owner and rendering the property economically useless, it has worked a taking and, under our Constitution, compensation is due.").

B. Lucas Has Been Deprived of All the Economic Value of The Property

In 1986 when David Lucas bought the two undeveloped oceanfront lots in the Wild Dunes Development on the Isle of Palms in Charleston County, South Carolina, Mr. Lucas had every intention of building on the lots -- a home for himself and another for sale -- and at that time, there was no legal impediment to the single-family residential development by the state, county or municipality. *Tr. Ct. at 1-2.* Mr. Lucas paid $475,000 for one lot and $500,000 for the other. *Tr. Ct. at 1.*

As a result of the passage of the Coastal Zone Management Act of 1988, with its attendant setback lines along the entire coast, Mr. Lucas' lots will now remain "forever undeveloped." *Tr. Ct. at 2.* The trial court found that, as a result of these building restrictions, Mr. Lucas is deprived

> of any reasonable economic use of the lots, [which] has eliminated the unrestricted right of use, and renders them valueless. *Tr. Ct. at 5.*

Thus, Mr. Lucas has, like the property owner in *Loveladies Harbor*, been simply left with empty lots which are destined to remain so. There is no question that Lucas has lost his investment and is left with property totally devoid of value. There is no question that this statute has gone too far, and

indeed, could go no farther than taking all economic value of Mr. Lucas' property. Therefore,

> the interference with [Lucas'] property is of such a magnitude that "there must be an exercise of eminent domain and compensation to sustain [it]." *Penn Central Transportation Co. v. New York*, 438 U.S. 104, 136 (1978) *quoting Pennsylvania Coal*, 260 U.S. at 413.

The legitimacy of the exercise of the police power is not at issue here. It is only legitimate exercises of police power which implicate the Fifth Amendment. *Nollan v. California Coastal Commission*, 483 U.S. 825, 841-42 (1987).

II. The Government Bears the Burden of Proving a Nuisance Defense to a Takings Claim

The South Carolina Supreme Court was correct when it stated that one may not use one's property so as to damage others. Conceptualizing this a little differently, the use of one's property so as to harm others is not a legitimate property right and, therefore, cannot be taken. *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, n.20 (1987). However, the South Carolina Supreme Court's reliance upon *Mugler v. Kansas*, 123 U.S. 623 (1887) and other cases in which this Court has found the nuisance exception applicable, is misplaced. In *Mugler*, this Court established the "noxious use" doctrine as a narrow exception to the Fifth Amendment taking clause mandate for those instances where the proposed use of property involves quite profound and immediate adverse physical effects upon the health, safety or welfare of others. *E.g., Keystone Bituminous Ass'n. v. DeBenedictis*, 480 U.S. 470 (1987) (subsidence threatening buildings and ground water) and

Miller v. Schoene, 276 U.S. 272 (1928) (state action to destroy certain trees carrying infectious disease hazardous to principal agricultural crop in Virginia).

But the validity of a nuisance defense cannot be determined by legislative pronouncements alone.[2] The mere passage of a statute outlawing certain activity does not determine whether a nuisance exists at the particular property.[3] First, government cannot be allowed to define property rights out of existence simply by calling otherwise legitimate uses of property a nuisance. *Cf., Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893).

> It does not rest with the public, taking the property, through Congress or the legislature, its representatives, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that

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[2] *Cf Loveladies Harbor, Inc. v. United States*, 15 C. Ct. 375, 388 (1988), where Court stated that "the mere fact that the governmental regulation was intended to promote a public benefit is not sufficient to [determine whether the regulation substantially advances a public purpose.] This determination must also involve the Court's weighing of that intended public benefit against the harm inflicted upon the landowner involved." *Quoting Agins v. City of Tiburon*, 447 U.S. at 261.

[3] This is not to say that the legislature cannot decree that certain activities injurious to public health and safety (*e.g.*, maintaining a facility for producing illegal drugs) constitute a *per se* nuisance. However, the Court must ascertain whether the activity actually falls within the common law notion of "nuisance," and may not simply accept the proposition that a formerly lawful activity is a "nuisance" merely because the legislature says it is.

> just compensation shall be paid, and the ascertainment of that is a judicial inquiry.

Id. at 327. Otherwise, the existence of particular property rights would be dependent upon legislative grace rather than being constitutionally protected against public seizure without just compensation. *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394 (1989), *modified*, 20 Cl. Ct. 324 (1990), *aff'd* 926 F.2d 1169 (Fed. Cir. 1991), *cert. denied*, U.S. (1991) (Enactment of SMCRA which deprived owner of all value of property is a taking); *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989) ("[L]egislature cannot simply alter these long-established property rights to accommodate new recreational needs.").

Second, the legislative branch is institutionally incapable of performing the judicial function of weighing the evidence necessary to determine whether the proposed use of the particular parcel of property will constitute a nuisance.[8] Whether a particular proposed use would constitute a threat of injury to others (*i.e.*, a nuisance) cannot be resolved in the present case by a general proposition that all coastline development is deleterious. Such coastline development has traditionally been permitted and even encouraged in South Carolina and elsewhere in our nation; hence, it has not traditionally been characterized as a nuisance. Thus, this landowner is entitled to notice and a judicial hearing to ascertain whether, on the facts of his particular case, the outlawed activity is a constitutionally-protected fundamental property right or (as contended here) an unprotected nuisance.

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[8] *But see* n.7 *supra* to statutes defining *per se* nuisances.

> Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case."

Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1977), *citing United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958). Moreover, if the legislature could take private property without notice and hearing, then serious due process concerns are implicated. As indicated by the court in *Florida Rock*, 8 Cl. Ct. at 171:

> [S]imple invocation of the term pollution cannot foreclose a plaintiff's right to compensation under the Fifth Amendment. "[M]ere labels" of this sort afford "no talismanic immunity from Constitutional limitations." (citations omitted) Government may not circumvent the takings clause by defining activity as noxious by fiat. . . . To avoid the payment of compensation on this theory, the government must show that the prohibited activity in fact causes harm.

Thus, the court, and not the legislature, is the appropriate forum in which to determine whether a nuisance exists. The government bears the burden of proving such a nuisance defense. *Cf., Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. at 154-58. The South Carolina Coastal Council failed to sustain this burden, choosing to rely instead on the legislative findings supporting the statute. Since those legislative findings, standing alone, do not constitute sufficient evidence to sustain the burden of proving the existence of a nuisance on the facts *of this particular case*,

the opinion of the South Carolina Supreme Court must be reversed.

CONCLUSION

Petitioner has proved a taking by demonstrating that he has been deprived of all of the economic value of his property. Respondent has failed to prove the existence of a nuisance defense.

For the foregoing reasons, the judgment of the court below should be reversed.

Respectfully submitted,

Nancie G. Marzulla
President and Chief
Legal Counsel
6235 33rd Street, N.W.
Washington, D.C. 20015
(202) 686-4197

Counsel for *Amici Curiae*

December 31, 1991 DEFENDERS OF PROPERTY RIGHTS